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COMPETITION REQUIREMENTS IN PUBLIC CONTRACTING:

The Myth of Full and Open Competition

An Analysis by

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COMPETITION REQUIREMENTS IN PUBLIC CONTRACTING:
The Myth of Full and Open Competition

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Introduction

One of the most fundamental differences between government contracting and contracts involving private parties is the legal requirement for competition in public contracting. Individuals and private businesses may contract with whom, for whatever, and in any manner they choose. They may *choose* to obtain some formal or informal competition in purchasing products or services, but there is no legal requirement to do so. Since there is no such requirement, there is no penalty for failing to use competitive procedures or for using them improperly. Most non-governmental buyers may make any or all purchases on a sole source basis—even from family members—buy more than they need or can afford, and even accept whatever gifts, entertainment or "kickbacks" a vendor may offer.

Like private individuals and businesses, "the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." [1] However, as Mr. Justice Holmes said, the Government needs the protection of publicity and form in order to prevent possible fraud upon it by officers.[2] Congress, incident to its power to authorize and enforce contracts, may require that they be carried out only in a manner consistent with its views of public policy.[3]

One of the earliest and most basic protections adopted by the Government in public contracting was the requirement for competition. As discussed below, Congress has required the use of competition in public contracting for nearly 200 years. There also is a long history of executive agencies resisting the competition requirements. As stated by the House Committee on Government Operations, government officials often seek to limit the number of vendors that can compete:

> This tactic undermines the Federal procurement system and results in excessive costs to the taxpayer. There is, unfortunately, a general attitude pervasive throughout the government that expanding the competitive base for government procurement is too costly, burdensome, and disruptive to agency activities. While the use of competition may not be considered worthwhile by some officials, it is the only way for the government to obtain the best products for the best prices.[4]

Competition is not a procurement *procedure* but an *objective*, which a procedure is designed to attain;[5] it is not simply a *means* to an end, but rather an *end* in and of itself. Executive agencies

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convinced Congress in 1984 that competition could be increased by relaxing competitive procedures. These relaxed procedures (*i.e.*, putting competitive proposals on a par with sealed bids) have obscured and, in many cases, undermined the true goals of competition by allowing contracts to be awarded to higher-priced offerors based on undisclosed rating systems for multiple and subjective evaluation factors such as aesthetics, corporate capability, employment policies, innovativeness, oral presentations, risk, understanding requirements, etc. The increase of discretion in evaluation caused by the subjective evaluation criteria in turn has led to increased bid protests by competitors attempting to learn what rules were applied and why the discretion was exercised to their prejudice.

Since competition is an objective and not a procedure, the goal of competition should be applicable to all products and services acquired by the Government. This means that the goal of competition is not inconsistent with the acquisition of commercial products. While some of the Government's current procurement policies (such as access to records, requirements for cost or pricing data, rights in technical data, etc.) and procedures (specifications, statements of work, inspections) may be impediments to purchasing commercial products, a requirement for competition is not. The increased acquisition of commercial products will necessitate different rules of competition, but the products can be acquired competitively nonetheless.

That competition is under attack is well known; there are various proposals pending in Congress and the Executive Branch to further relax competitive procedures and even limit the statutory requirement for full and open competition. (Ironically, these initiatives to curtail competition in the context of domestic procurements are occurring at the same time that the Government is promoting the expansion of competition in international procurement agreements.) What perhaps is not so well known is that competition has been under attack for some time, with the result being that there has been an erosion of the full and open competition standard.

This article reviews the background of, and current requirements for, full and open competition in U.S. Government contracting. It is submitted that the avowed full and open competition standard has been eroded to the point where it is today more myth than reality and that efforts to encroach still more on this standard are unwise and unwarranted.

Background

Purposes and Benefits of Competition

The chief purposes of competition in public contracting are to afford private sector individuals and entities that seek to do business with the Government an opportunity to do so, to obtain lower prices, and to avoid fraud, favoritism, and abuse.

> The purpose of these statutes and regulations is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis. Conditions or limitations which have no reasonable relation to the actual needs of the service and which are designed to limit bidding to one of several sources of supply are interdicted, and render the award of a contract made in such circumstances voidable.[6]

It follows that, in order to achieve the purpose of competitive bidding by government agencies, it is necessary to eliminate or limit the discretion of contracting officials in areas that are susceptible to abuses, such as fraud, favoritism, improvidence, and extravagance.[7]

In addition to ensuring that a procurement is open to all responsible suppliers, competition is intended to provide the Government with an opportunity to receive fair and reasonable prices.[8] Reports from the

House and Senate Committees considering the Competition in Contracting Act of 1984 (CICA)[9] estimated the savings from competition at between 15 and 70 percent per procurement.[10] Some 20 years earlier, the Department of Defense (DOD) reported to Congress that its studies showed that "each dollar spent under price competition buys at least 25 percent more." [11] One year later, Defense Secretary Robert S. McNamara told Congress:

> Failure to use competition more extensively in Defense procurement in the past has not only resulted in higher prices, but has also deprived us of the benefits of a broader industrial base among suppliers, both large and small.[12]

The benefit of competition both to the Government and to the public in terms of price and other factors is directly proportional to the extent of competition.[13]

The legislative history of CICA identified other benefits of competition, namely, curbing cost growth, promoting innovative and technical changes, and increasing product quality and reliability.[14]

> The last, and possibly the most important, benefit of competition is its inherent appeal of "fair play."[] Competition maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism.[15]

History of Competition Requirements

During the Revolutionary War, government purchasing was characterized by sharp practices, profiteering, and kickbacks. Over the years, competition and sealed bidding were gradually adopted in order to combat fraud and abuse.[16] Congress established the requirement for competition in contracting, with formal advertising as the preferred method, in 1809.[17] Various other statutes requiring formal advertising were enacted between 1809 and 1861, when the law requiring advertising for *all* purchases and contracts for supplies or services (except personal services) was enacted.[18] This law later became Section 3709 of the Revised Statutes, which was the principal government procurement statute.[19]

Section 3709 did not expressly describe the scope of required competition. The "advertising" method itself suggests unlimited competition. The statute implied, therefore, the broadest possible scope of competition. As early as 1931, the Comptroller General referred to the scope of required competition as "full and free" competition [20] and "full and open" competition.[21] He said every effort should be made to "permit the broadest field of competition." [22] As stated in a Department of Defense procurement presentation to the Procurement Subcommittee of the Senate Committee on Armed Services in 1960:

> Section 3709, Revised Statutes, contemplates that in purchasing for Government needs the *widest competition possible* be had, and that all qualified persons be given opportunity to compete. To confine invitations to bid [to] a comparative few of those in position to supply the needs of the Government is not in compliance with the statute.
>
> (Emphasis added.) [23]

At the beginning of World War II, Congress gave the President emergency authority to enter into contracts and modifications of contracts without regard to other provisions of law based upon findings that such actions would facilitate the prosecution of the war.[24] This emergency authority expired at the end of the war. The subject of peacetime procurement was considered by the Procurement Policy Board of the War Production Board, which was composed of representatives of the various contracting agencies. This resulted in a recommendation for new legislation to permit the use of negotiation "rather than the rigid limitations of formal advertising, bid and award procedures." [25] This recommendation resulted in the Armed Services Procurement Act of 1947, which contained a general requirement for advertising for bids but permitted negotiation in 17 exceptions contained in Section 2(c) of the law.[26]

Section 3(a) of the Armed Services Procurement Act stated that whenever advertising is required:

> The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such *full and free competition* as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(Emphasis added.) [27] There was no discussion or explanation of the phrase "full and free competition" in the reports accompanying the legislation. For some unexplained reason, the phrase was changed to "free and full competition" when the law was codified as 10 U.S.C. § 2305.[28] In advocating the legislation, Congress was told:

> The War and Navy Departments firmly support the principle that, in peacetime, competitive bidding should be the ordinary method of procurement. The primary purpose of the bill is to permit the War and Navy Departments to award contracts by negotiation in those exceptional cases where the national defense or sound business judgment dictates the use of negotiation rather than the rigid limitations of formal advertising, bid and award procedures.[29]

The legislative history states that the purpose of the Armed Services Procurement Act was to "return to normal purchasing procedures through the advertising-bid method on the part of the armed services." [30] The statutory requirement in formal advertising for "such full and free competition as is consistent with the procurement" also was included in Section 303(a) of the Federal Property and Administrative Services Act of 1949,[31] which was applicable to civilian agencies and which contained 15 exceptions permitting negotiation.

Current Competition Requirements

In the years following enactment of the Armed Services Procurement Act and the Federal Property and Administrative Services Act, negotiation became less the exception and more the rule. By 1960, negotiation accounted for 85% of all federal contract dollars and, as a result, the Armed Services Procurement Act was amended in 1962 to encourage the use of formal advertising and to obtain more competition in negotiated procurements.[32] Based on its continued concern over the use of noncompetitive procedures, the Senate Committee on Governmental Affairs held hearings in 1982 at which the consensus among the witnesses was that "competition in government contracting may be the requirement, but not the practice." [33] Congress responded with CICA, the objective of which was to "establish an absolute preference for competition." [34]

CICA amended the Federal Property and Administrative Services Act to require that, with certain exceptions, civilian agencies use "full and open competition through the use of competitive procedures." [35] CICA also amended the Armed Services Procurement Act to require (also with exceptions) that bids and proposals be solicited "in a manner designed to achieve full and open competition for the procurement." [36] CICA amended both laws to permit "restrictive provisions or conditions," but only to the extent necessary to satisfy the needs of the agency or as authorized by law.[37] The House-Senate Conference Committee said this and other provisions were included "in order to maximize, rather than limit, competition." [38]

The Senate provisions leading to CICA had used "effective" competition as the standard for awarding contracts (*i.e.*, a marketplace condition resulting from the receipt of two or more independently submitted bids or proposals).[39] The Conference Committee, however, substituted the "full and open competition" standard, stating:

> The conference substitute uses "full and open" competition as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids

or proposals for a proposed procurement. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which contractor responsibility is determined by the agency after offers are received.[40]

The phrase "full and open competition" was defined in CICA to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals," and the phrase "competitive procedures" was defined to mean "procedures under which an agency enters into a contract pursuant to full and open competition." [41]

The strong congressional policy favoring competition also was reflected by the CICA provision establishing in all executive agencies a "competition advocate" with the specific responsibility for challenging barriers to and promoting full and open competition in the procurement of property and services.[42] This strong policy has been interpreted as requiring agencies to satisfy more stringent requirements than had previously been the case in order to enter into contracts using other than full and open competition.[43]

Exceptions to Competition Requirements

There are nine exceptions to the requirement for full and open competition. They are listed here to illustrate current flexibility in government acquisitions. The first seven are expressly stated in CICA; the eighth is implied in CICA, and the last is derived from case law.

1. Limited Sources — Full and open competition is not required when property or services are available from one source and no other type of supplies or services will satisfy the agency's needs.[44] Since 1987, DOD, the National Aeronautics and Space Administration, and the Coast Guard can use this exception if the property or services are available only from "a limited number of responsible sources." [45] This authority may be used in certain cases for contracts based on unsolicited research proposals and follow-on contracts for a major system or highly specialized equipment.[46]

2. Urgency — Full and open competition is not required when an agency's need for property or services "is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals." [47] Agencies using this exception, however, must request offers from as many potential sources as practical.[48] An urgency justification does not support the procurement of more than a minimum quantity needed to satisfy the immediate urgent requirement and should not continue for more than a minimum time.[49] Further, urgency may justify *award* of a contract but not the inclusion of contract options.[50]

3. Industrial Capability and Availability — Another exception is available to award contracts to maintain the availability of a facility, producer, manufacturer, or supplier in case of a national emergency or to achieve industrial mobilization or to establish or maintain an essential engineering, research or development capability to be provided by an educational or other nonprofit institution or a federally-funded research and development center.[51]

4. International Agreements — Full and open competition is not required when an international agreement or treaty, or the written direction of a foreign government reimbursing the agency for the cost of the procurement, has the effect of precluding full and open competition.[52] This is the authority used for foreign military sales (FMS) under the Arms Export Control Act.[53]

5. Authorized or Required by Law — If a statute "expressly" authorizes or requires that the acquisition be made through another agency or from a specified source, or if a brand-name commercial item is needed for authorized resale, full and open competition is not required.[54] This authority is used for awards under the Small Business Act's Section 8(a) program, purchases from the Federal Prison

Industries, purchases from nonprofit agencies for the blind or severely handicapped, and government printing and binding.[55]

6. National Security — Full and open competition need not be utilized when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.[56] Agencies relying on this exception are required to solicit as many sources as practicable, and classified procurements should be competed among all contractors having proper security clearances.[57]

7. Public Interest — The head of an agency may determine that it is not in the public interest to utilize full and open competition for a particular procurement, but Congress must be notified not less than 30 days before award.[58] This exception was not in the House or Senate versions of CICA but was added by the Conference Committee.[59]

8. Small Purchases — An implied exemption from full and open competition is contained in the CICA provision requiring "special simplified procedures" for small purchases which states that, for these procedures, the agency shall "promote competition to the maximum extent practicable." [60]

9. Reprocurement Contracts — The Comptroller General has consistently held that, when a reprocurement is for the account of a defaulted contractor, the procurement statutes and regulations governing regular procurements are not strictly applicable, but competition should be obtained to "the maximum extent practicable." [61]

Basic Competition Requirements

Overview

Congress historically has established *goals* of competition and described general *methods* of obtaining competition (*e.g.*, advance planning, market research, formal advertising, sealed bids, competitive proposals) but has left the specific requirements and "rules" of competition to the Executive Branch. The legislative history of both the Armed Services Procurement Act and the Federal Property and Administrative Services Act indicates that Congress felt it unusual and unnecessary to prescribe detailed and restrictive requirements that could be dealt with appropriately by administrative regulations.[62] As discussed below, there have been a few "rules" added to the laws in recent years.

No real attempts have been made to evaluate the essential requirements of "competition." Certain elements or rules have been identified by the Comptroller General on a case-by-case basis, and some of these are included in the "rules" for sealed bidding [63] and competitive proposals [64] in the Federal Acquisition Regulation (FAR). When the Senate's version of CICA used "effective competition" as the standard (as opposed to "full and open competition," which was ultimately substituted by the House-Senate Conference Committee), the Senate Report said it was not amenable to rigid definition:

> Although "effective competition" is not amenable to rigid definition, a description is important to establish the thrust of the legislation and the rationale for many of its provisions. Five components characterize "effective competition": (1) the information required to respond to a public need is made available to prospective contractors in a timely fashion; (2) the government and contractor act independently; (3) two or more contractors act independently to respond to a public need by offering property or services which meet that need; (4) the government has expressed its need in a manner which promotes competition; and (5) there is no bias or favoritism, other than required by law, in the contract award.[65]

The Conference Committee substituted "full and open" competition to emphasize that *all* responsible sources should be permitted to submit bids or proposals.[66]

Maximize Competition

There is one clear description from Congress of the scope of competition mandated by law — the maximum possible competition. This is evidenced from the legislative history of CICA,[67] the implementing procurement regulations,[68] and the bid protest cases interpreting the law and regulations.[69] The Comptroller General has stated that it is a "general rule of federal procurement" that specifications should be drafted in such a manner that "competition is maximized" unless a restrictive requirement is necessary to meet the Government's minimum needs.[70] CICA imposes a clear requirement that agencies undertake an *affirmative effort* to maximize competition.[71] The one limitation on the scope of competition is the CICA provision permitting restrictive provisions or conditions, but only to the extent to satisfy the needs of the agency or as authorized by law.[72]

One result of the requirement to maximize competition is that all offerors must be considered, and no responsible source can be *excluded* from the competition without justification.[73] The Comptroller General has repeatedly stated that he will give careful scrutiny to an allegation that someone has been denied the opportunity to compete for a particular contract.[74]

The requirement to consider all responsible sources does not require an agency to delay a procurement until a particular vendor is able to compete. The requirement for full and open competition does not mean "that an agency must delay satisfying its own needs in order to allow a vendor time to develop the ability to meet the Government's requirements."[75] One reason there is no such requirement is that the law defines a "responsible source" as a prospective contractor who is able to comply with the required or proposed delivery or performance schedule.[76]

Rules of Competition

One of the most basic requirements of any type of competition (sports, cards, artistic awards, etc.) is that there be rules and that the rules be enforced. Even in business and social relationships, there are "unwritten" rules to which people must conform in order to remain included in the group or avoid "penalties." As the type of competition becomes more sophisticated and the stakes grow larger, it is increasingly important that the rules of competition be adequately defined and uniformly enforced. When this does not occur, many participants simply drop out of the competition.

In government contracting, there is an inherent conflict between the desires of potential contractors and those of the Government. Potential contractors want very specific information regarding the Government's requirements and the rules of competition in order to decide whether or not to expend the time and effort and incur the cost of engaging in the competition. For their part, government agencies at least pay lip service to competition, but the actual users of supplies or services usually would prefer no competition at all and chafe at the rules and "red tape" of procurement procedures. The government users usually know the vendor they want or prefer, and describing their requirements adequately for competition in specifications or statements of work often is not a high priority (and, unfortunately, the technical people tasked with writing the descriptions usually are not on a career fast track). It is not surprising that specifications written around the product of a particular vendor are frequently developed. Nor is it surprising that government officials "split" a requirement to get below a specified dollar threshold for full competition.

One of the most basic principles of federal procurement law is that specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis.[77] If specifications are ambiguous, competitors interpret them differently and, as a consequence, their bids or proposals are not comparable because their offers are made on a different basis.[78] *Indefinite* specifications also preclude real competition:

> If bidders are invited to offer equipment varying from the specifications to some undefined extent, the bidders may loosely be said to be in a position of equality in that each may offer what he chooses, but there is totally lacking any basis for bidders to know what they are bidding for or against.[79]

These principles also are implied by the statutory requirement that agencies specify their needs and develop specifications in a manner that permits full and open competition.[80] Even in acquiring commercial products, an agency is obligated to describe the item in a way that identifies the agency's needs with sufficient detail and clarity so that all vendors have a common understanding of what is required under the contract in order that they can compete intelligently on a relatively equal basis.[81]

Another fundamental rule of competitive procurements is that all offerors must compete on a common basis. Each competitor has the right to assume that the essential requirements of the solicitation are the same for all bidders or offerors.[82] Competing on an equal basis encompasses the notion that vendors bid on the same terms, conditions, and specifications.[83] When an agency relaxes its requirements, either before or after receipt of proposals, it must issue a written amendment to notify all offerors of the changed requirements.[84] The statutory requirement that bids and proposals shall be evaluated, and awards made, solely on the factors specified in the solicitation[85] also reflects this concept. Also, an evaluation that incorporates more or less than the work that actually will be awarded fails to comply with the requirement for full and open competition.[86] Essentially, these rules mean that everyone should have an equal opportunity to compete for award of the contract.[87]

The procurement statutes also now include "rules" requiring that all evaluation factors and subfactors, and the relative importance assigned to each, be included in solicitations for sealed bids and competitive proposals.[88] A new requirement in the Federal Acquisition Streamlining Act of 1994 (FASA) (discussed below) requires that requests for proposals disclose whether all evaluation factors (other than cost or price), when combined, are significantly more important, approximately equal to, or significantly less important than cost or price.[89] The statutes include a few very general provisions for opening bids, evaluating bids and proposals, and awarding contracts.[90]

Perhaps the most important rule of government contract competition is that the Government must deal fairly and honestly with all offerors competing for federal contracts.[91] One decision expressed this rule as a requirement that vendors receive impartial, fair, and equitable treatment.[92]

Adequacy of Competition

The legislative history of CICA suggests the test for full and open competition is whether all qualified vendors are allowed and encouraged to submit offers and a sufficient number of offers is received to ensure that the Government's requirements are filled at the lowest possible cost.[93] The propriety of a particular procurement rests upon whether adequate competition and reasonable prices were received by the Government. In this connection, the Comptroller General has said regarding the exclusion of competitors:

> An agency has satisfied CICA's full and open competition requirement when it makes a diligent good-faith effort to comply with the statutory and regulatory requirements regarding notice of the procurement and distribution of solicitation materials, and it obtains a reasonable price.[94]

The test is whether a fair and reasonable price is obtained in response to the solicitation and not whether a lower price could be obtained if one or more competitors were given another chance.[95]

Permissible Restrictions on Competition

General Authority

In addition to the statutory exceptions to the requirement for full and open competition discussed above, agencies may include *restrictive provisions* or *conditions* in their solicitations even where full and open competition is required to the extent necessary to satisfy the agency's needs.[96] One bid protest decision stated that all procurements involve inherent limits on competition because the use of performance or design specifications is, by definition, restrictive; therefore, the real rule is that specifications cannot be *unreasonably* restrictive.[97] The right to impose reasonable restrictions under the advertising requirements of Section 3709 was recognized as early as 1895 by the Comptroller of the

Treasury, who said that if the specialized supplies could not be obtained from ordinary dealers, it was permissible to "provide in the advertisement for such supplies that proposals will be limited to the class of people competent to furnish the character of articles required." [98] Where a solicitation includes requirements that restrict the ability of offerors to compete, the agency must have a reasonable basis for imposing the requirements.[99]

When a solicitation is challenged as being unduly restrictive of competition, it is the procuring agency's responsibility to establish that the specification requirement is reasonably necessary to meet its minimum needs.[100] In such cases, the Comptroller General reviews the record to determine whether the requirement has been justified. The adequacy of the agency's justification is ascertained by evaluating whether the agency's explanation is reasonable, *i.e.*, whether it can withstand logical scrutiny.[101] Stated another way, the issue is whether the restriction is "rationally premised and reasonable." [102]

The Comptroller General does not weigh the advantages and disadvantages of the agency's chosen approach; his sole concern is whether the restrictions are reasonably necessary to meet the agency's minimum needs.[103] The Comptroller General has recognized that avoiding significant unnecessary delays or avoiding unnecessary duplication of costs may justify restrictions on competition.[104] If a rational explanation is not provided, however, the provision will be held unduly restrictive.[105] The remainder of this section will discuss major categories of circumstances in which restrictions on competition have been justified.

Approved Products

The procurement regulations describe three types of product prequalification that may be used to restrict competition in connection with solicitations for products; namely, qualified bidders list (QBL), qualified manufacturers list (QML), and qualified products list (QPL).[106] These involve the pre-testing of a product to demonstrate compliance with a specification requirement (which is not a responsibility issue of ability or capacity of an offeror requiring referral to the Small Business Administration if the product is not qualified).[107]

A procuring agency may limit competition for the supply of parts if doing so is necessary to ensure the safe, dependable, and effective operation of equipment.[108] Such restrictions are permissible where doing so is necessary to ensure the procurement of satisfactory end products or the maintenance of a high level of quality and reliability necessitated by the critical application of a product.[109] The Comptroller General will, however, even review use of a QPL to determine whether the restriction is reasonable.[110]

There are special statutory procedures that must be followed if qualification requirements are imposed.[111] Agencies must provide offerors with a prompt opportunity to demonstrate their qualifications.[112] This includes informing potential offerors of the requirements that must be satisfied in order to become qualified.[113] The agency also must ensure that an offeror is promptly informed as to whether qualification has been attained and, if not, promptly furnish specific information why qualification was not attained.[114] An agency's failure to act upon a request for approval within a reasonable time deprives the offeror of a reasonable chance to compete and, therefore, is inconsistent with CICA's mandate for full and open competition.[115] However, an agency is not required to delay a procurement in order to provide a potential offeror an opportunity to become approved.[116]

Bonding Requirements

Although bonding requirements may result in a restriction of competition, an agency may impose such requirements in appropriate circumstances as a necessary and proper means to secure fulfillment of the contractor's obligations.[117] As a general rule, agencies are admonished against the use of bonding requirements in nonconstruction contracts, but the use of bonding is permissible where needed to protect the Government's interests.[118] In reviewing challenges to bond requirements, the Comptroller General will merely look to see if they are reasonable and imposed in good faith.[119] One area where the requirement frequently has been justified is where the agency states that the continuous operation of services is absolutely necessary.[120] Bonding requirements have been approved regardless of whether the

agency's rationale comes within the four reasons for a performance bond articulated in FAR § 28.103-2(a).[121] The restriction on competition may be justified even where small business concerns [122] and small disadvantaged businesses [123] may be excluded from competition because they are unable to obtain bonds.

Bundling and Total Package Procurements

Solicitations that combine or integrate separate, multiple requirements into a single contract are called bundled, consolidated, or total package procurements.[124] Such procurements have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement.[125] Accordingly, the Comptroller General will object to such procurements where a bundled contract or total package does not appear necessary to satisfy the agency's minimum needs.[126]

One justification frequently used to consolidate requirements into a total package is the "single contractor" argument. Bundling has been upheld where a single contractor was required to ensure the effective coordination and integration of interrelated tasks or where procurement by means of separate acquisitions would involve undue technical risk or would defeat a requirement for interchangeability and compatibility.[127] Another example is where there is a need for a single prime contractor to be responsible for all phases of design, development, and testing.[128] A single contractor approach for the upgrade of a jet engine was justified on the basis that the Government's buying, storing, and issuing parts on an individualized basis would require excessive effort and would jeopardize the schedule and flow of engines through the government depot facility.[129] A single contractor approach also was upheld to ensure the effective coordination and integration of interrelated tasks, including the timely availability of components.[130] The Air Force even supported the need to integrate landscaping and construction requirements into one procurement to allow for "efficient and economical processing of the contract work." [131]

An agency's minimum needs include the need to procure supplies and services on the most cost-effective basis, and the possibility of avoiding unnecessary duplication of costs may justify consolidating several requirements under a total package approach.[132] An agency's decision to procure under a total package approach was upheld in the absence of evidence that the approach did not ensure the most cost-effective method of procuring the items and when, in doing so, the agency avoided unnecessary administrative costs.[133] In appropriate circumstances, the agency's staffing resources can and should be properly considered in fashioning contracts that will satisfy the Government's minimum requirements at the lowest reasonable cost.[134] On the other hand, concern about incurring additional costs can justify restrictions on competition only in unusual circumstances, the existence of which must be clearly demonstrated. Generally, where an agency concludes that having separate contractors may lead to additional costs, the proper course is not to restrict competition, but rather to structure the solicitation evaluation criteria so as to take all costs into account.[135] However, in one case, the small size of an agency's contracting staff was held to justify the agency's combining electronic systems maintenance and operation, refuse collection, and janitorial services.[136]

Other reasons used to justify bundling requirements include the need to ensure military readiness,[137] the need to avoid unacceptable periods of downtime for an emergency communications system during an upgrade and expansion effort,[138] and the need to combine educational services to provide for low enrollment areas and to provide for a complete program.[139] An agency should consider minor adjustments to its bundling of purchases if a protester shows that the structure of the package reduces competition and that it may cost the agency more money than the package will save because of the reduced competition.[140]

Contractor Qualifications

The prequalification of *offerors*, as opposed to the prequalification of *products*, generally results in an unwarranted restriction on free and open competition.[141] Nevertheless, under certain limited circumstances, the prequalification of offerors may be justified.[142] One example is where an agency needs some assurance from a source independent of the bidder that a safety system (such as a fire

alarm) works. Thus, a requirement for certification by Underwriters Laboratory or Factory Mutual has been upheld.[143] The Comptroller General generally has not objected to a requirement for membership in an industry organization or a requirement that products conform to standards by a nationally recognized organization.[144] However, a requirement for a specific testing laboratory's seal of approval generally is considered unduly restrictive because prospective contractors should be permitted to present other credible evidence that their items conform to established standards.[145]

An indirect form of prequalification is to impose specific responsibility-type requirements on offerors. For example, a solicitation requirement for a minimum of two years' corporate experience in providing family service functions was upheld as necessary to ensure high quality services.[146] Another solicitation requirement that certain key staff positions on cable ships be staffed by persons with experience aboard that type of ship also was upheld.[147] Any solicitation requirement stating a specific and objective standard to measure an offeror's ability to perform is called a "definitive responsibility criterion." An agency may include definitive responsibility criteria provided that the criteria reflect the agency's legitimate needs and the restriction on competition is reasonable.[148]

Delivery Requirements

One of the best examples of a permissible restriction on competition involves the Government's required delivery for the supplies or services. A short delivery schedule is permissible so long as it reflects the Government's legitimate minimum needs. There is no requirement that an agency understate its minimum needs merely to increase competition.[149] The number of possible sources for an item or service does not determine the restrictiveness of solicitation provisions.[150] Consequently, even if only one firm can meet the delivery requirements, this does not establish that the agency's delivery schedule is not reasonably related to its minimum needs.[151]

Geographic Restrictions

An agency may restrict a procurement to bidders or offerors within a specified geographical area if the restriction is reasonably necessary for the agency to meet its minimum needs.[152] One category of procurements in which such restrictions are applied involves the location of buildings for government offices. The Secret Service justified a restriction for its offices to a designated area with a central location in Houston near the Houstonian Hotel (the designated temporary residence of the President while in Houston) with easy access to major arteries to downtown, in a close proximity to the Houston Police Department, close to the Federal Building, and allowing for secured parking.[153] A restriction to an area near the courthouse was justified on the basis that Justice Department attorneys had to make several trips to the courthouse each day (with bulky files and boxes).[154] The Drug Enforcement Administration excluded the Canal Street area in New Orleans for its office on the basis that the area posed unacceptable security risks for its agents.[155] Government employee travel time has been held to be a legitimate consideration in determining an agency's minimum needs for office space.[156]

The necessity for government employee travel also is a legitimate consideration in assessing an agency's need for geographic restrictions based on other considerations.[157] Restrictions have been upheld based on a demonstrated need for close liaison between agency personnel and the contractor and for close control over documents or data involved in a contract.[158] A geographical restriction was upheld because of the agency's operational need to improve efficiency by minimizing unproductive employee travel,[159] even if only to avoid traffic congestion in a highway tunnel.[160] Geographic restrictions for facilities serving military recruiting stations also have been upheld to increase efficiency, reduce the possibility of highway accidents, and improve the impression on military recruits.[161] Travel time is not just a cost consideration. One protester argued that there were commonly used methods of determining travel cost that could be incorporated into the solicitation to increase competition, but the restriction was justified on the basis of quality assurance requirements and to avoid unproductive travel time during working hours.[162]

Security

Military readiness and security considerations to meet possible wartime or emergency conditions is an actual need justifying restrictions on competition in appropriate circumstances.[163] One restriction which may be needed is a limitation to potential contractors with security clearances. The degree to which classified information must be protected by the use of certain security clearances is a matter within the discretion of the cognizant agency and will not be reviewed under the Comptroller General's bid protest function.[164] Potential competitors may object that the clearance level is too high, takes too long to obtain, or that the agency will not even initiate the application process until after award. The Comptroller General takes the position, however, that the fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if it properly reflects the agency's minimum needs.[165]

Standardization

The Comptroller General has recognized that, although there may be some restriction on competition, an agency may specify brand name components to be delivered as part of a system when the agency has a legitimate need for the specific brand.[166] One recognized agency need is to standardize equipment.[167] The need for standardization may involve sophisticated equipment, such as computer keyboards, in order to increase user friendliness and to eliminate time delays when operators must learn to operate new or different keyboards.[168] The need to standardize also may involve less sophisticated operations, such as welding.[169]

Urgency

CICA requires that, even where urgency justifies limiting competition, the agency still must solicit offers from as many potential sources as is practicable under the circumstances.[170] Thus, an urgency determination does not itself justify a decision to award a sole source contract.[171] The agency may limit the procurement to the only firm it reasonably believes can properly perform the work in the available time, provided the limitation is justified.[172] Since the agency can limit the competition to firms with satisfactory work experience that it reasonably believes can properly perform the work, the agency is not even required to solicit the incumbent contractor if it reasonably doubts that the incumbent can perform the work.[173] A military agency's assertion that there is a critical need that has an impact on military operations carries considerable weight with the Comptroller General.[174]

Other Restrictions

A solicitation restricted to modified commercial off-the-shelf equipment was justified by the agency's desire to avoid the risks of purchasing an unproven design.[175] An agency may require a firm seeking source approval to provide technical data from the original equipment manufacturer (even if the information is proprietary and difficult to obtain), so long as the data is reasonably necessary to evaluate the product.[176] Solicitations requiring products "compatible" with existing equipment are generally approved.[177] Even a specification requiring uniformity of appearance with the agency's previous acquisition was upheld.[178] An agency may specify items with superior performance characteristics allowing for as much reliability and effectiveness as possible.[179] Some cases hold that a restriction to new equipment,[180] or equipment with a maximum age, is permissible.[181] At least two decisions, however, have held that a restriction to new equipment was not justified.[182]

An interesting recent decision involved a solicitation for instructional services that required the contractor to be accredited from one of 10 accrediting associations. The protester contended the requirement overstated the Government's needs because the Army was not awarding degrees, giving academic credit, developing curricula, etc. The Army contended that the restriction was necessary to reduce unacceptable risks, such as uncertified teachers, nonexistent lesson plans, and substandard instructional material. The Comptroller General denied the protest.[183]

Erosion of Competition and Purchasing Limitations

Contrary to the express purpose of CICA to *increase* competition, there has been a significant erosion of "real" competition in the last decade. A 1987 report by the General Accounting Office (GAO) reviewing DOD's compliance with CICA discussed awards *reported* by DOD as based on full and open competition but *actually* based on the submission of only *one* offeror.[184] In a follow-up audit three years later, GAO sampled awards reported as based on full and open competition and the submission of only one offeror and found that the agency had used practices inconsistent with full and open competition for one-half of the sample.[185] The attenuation of competition has a direct effect on increased costs to the Government because "the benefit of competition to both the government and to the public in terms of price and other factors is directly proportional to the *extent* of competition."[186]

DOD has an entire program devoted to the shrinking availability of sources of supply and recently indicated that "diminishing manufacturing sources is a major potential problem."[187] A GAO report stated that DOD does not have systems that provide information on the magnitude and extent of the problem of diminishing sources but the examples listed of causes of the problem included only suppliers ceasing production, discontinuing distribution, or moving to a foreign country.[188] The fact that vendors may simply *choose* not to sell to the Government was not mentioned as a possible cause (although GAO did say that the private sector is increasingly more sensitive to its commercial customers rather than DOD).

In addition to the decline in the *amount* of competition, the *quality* of competition in government contracting has decreased in the last decade. The quality of competition has eroded, not because of the increased use of a particular *method* of competition (competitive proposals), but because of the failure to apply effective *rules* of competition to this method. Competition by sealed bidding has been recognized for over a century as a method of reducing costs, fraud, and favoritism. The reason this method is effective is that the *rules* of competition are fully disclosed (timely bids, responsive bids, evaluation factors, bid guarantees, etc.), there are objective standards for the competition, the bids are publicly opened to ensure the integrity of the system, and award is made to the low responsive bidder (with "responsibility" determined separately).

As discussed in this section, there are factors and circumstances currently associated with competitive proposals that are the antithesis to any form of competition; namely, indefinite or ambiguous goals (*i.e.*, products or services); undisclosed rules of competition, discretionary application of the rules, and discretionary enforcement of the rules. The presence of one or more of these factors or circumstances undermines competition and causes competitors to lose faith in the integrity of the system. When this occurs, as in any type of competition, many of the best competitors elect not to participate. ***In most cases, a bad rule is better than no rule, and consistent application and enforcement of a bad rule often is better than discretionary application and enforcement of a good rule.***

Discretion and flexibility are desirable procurement goals in selecting different *methods* of procurement or evaluation factors for different circumstances, but discretion and flexibility in applying or enforcing the *rules* of competition to each method or evaluation factor are not. In sealed bidding, when you name the game, you disclose the rules. In competitive proposals, as discussed below, offerors do not know if the "game" is low price, best product, lowest risk, highest quality, etc. Government buyers prefer the "cafeteria plan" of source selection, *i.e.*, look at what is offered and then decide what is "wanted" and what can be purchased with the available funds. This method of selection not only has led to higher prices but also has seriously eroded one of the most basic historical limitations on government spending—the so-called "minimum needs" doctrine that has restrained unnecessary acquisitions for over 100 years. The factors and circumstances that have contributed to the erosion of competition and the limitation on government spending will be discussed in this section.

Specifications

It is a basic tenet of federal procurement law that specifications must be sufficiently definitive so as to permit competition on a common basis.[189] CICA and the FAR require that specifications be developed "in such manner as is necessary to obtain full and open competition."[190] This important and

specific statutory requirement (to do whatever is necessary) is almost *never mentioned* in bid protest cases. The Comptroller General has stated that, in addition to treating potential suppliers fairly, they should be informed "as fully as possible of what it is the Government needs." [191] Competitors must be given enough information to know what they are competing *for* and what they are competing *against*.[192] "Loose" specifications are similar to the poet Robert Frost's description of free verse—it is like playing tennis with the net down. Contracting agencies have the responsibility for drafting proper specifications.[193] The preparation of specifications and statements of work is a skill that is rarely emphasized or even recognized in the Government. (The development of courses of instruction for government personnel in this area might be the best "investment" the Government could make in cost reduction.)

It is a fundamental principle of procurement law that *ambiguous* specifications preclude competition on a common basis.[194] An ambiguity exists if the specifications are subject to more than one reasonable interpretation.[195] For example, a specification requirement for "first class material and workmanship" was not sufficiently definite because the phrase was subject to varying degrees of interpretation.[196] Specifications permitting different offerors to assume different requirements would improperly permit proposals to be prepared on different cost and technical bases.[197] Procuring agencies have argued that industry standards have not been developed and offerors should be permitted to propose whatever product they choose, but the flaw in the argument is that it permits each offeror to define the specification for itself and, to the extent that offerors do so differently, they are not competing on an equal basis.[198] Other government agencies make the equally erroneous decision to reject an offer that interprets the specification differently from the agency.[199] One impediment to convincing agencies that specifications and statements of work should be more definite is the Comptroller General's position that specifications need not be drafted in such detail as to eliminate all risk or remove every uncertainty.[200]

Precise design specifications describing how a product will be manufactured are not required. The Comptroller General has said, in fact, that design specifications "are generally inappropriate if an agency can state its minimum needs in terms of performance specifications which alternate designs could meet." [201] Performance specifications leave to the contractor the responsibility of choosing the means, methods, and techniques for accomplishing the contract work.[202] The Comptroller General has said he will not object to specifications that are "written around" design features of a particular item where the design specified is necessary to meet the agency's minimum needs,[203] but that restricting a solicitation to a specific make and model does not meet the requirement for full and open competition.[204]

A major problem with ambiguous specifications is the risk placed on contractors. If specifications contain a patent or obvious ambiguity, the contractor is under a duty to inquire and seek clarification.[205] The problem is the well-recognized "gray area" between when an ambiguity is obvious and when it is not.[206] The critical issue is the degree of scrutiny reasonably required in reviewing specifications.[207] The courts and boards of contract appeals necessarily have the advantage of 20-20 hindsight when deciding this issue (and have not experienced the pressures and time constraints in preparing bids or proposals). In competitive proposals, an offeror can "interpret" the specification in its proposal (shifting the burden of clarification back to the Government) and clarify issues in discussions. However, inadequate specifications always undermine competition, and this factor almost always is ignored in "reform" initiatives. It is a popular misconception that a low price means poor quality. If you are buying or selling gold and specify 98 percent purity, the price is irrelevant to quality if you *specify* the purity required, *inspect* to assure the product conforms, and *reject* any nonconforming products.

Undisclosed Evaluation Plan

Government agencies enjoy broad discretion in the selection of evaluation factors, and those factors and the evaluation scheme will be upheld so long as the criteria used reasonably relate to the agency's needs.[208] As discussed above, the procurement statutes and regulations require that the evaluation factors and subfactors, and the *relative* importance assigned to each, be included in solicitations for bids and proposals.[209] The Comptroller General has said it is "fundamental that offerors should be advised of the basis on which their proposals will be evaluated." [210] He has even released the source selection scoring plan in a bid protest case because it is "necessary to give the protesters a meaningful

opportunity to develop their protests." [211] Nevertheless, the Comptroller General has consistently held that only the "broad scheme of scoring to be employed" need be disclosed to competitors in the solicitation.[212] The precise scoring method to be used need not be disclosed.[213] These plans are internal agency instructions and, as such, do not give outside parties any rights.[214]

Although the general rule is that an agency may not double count, triple count, or otherwise greatly exaggerate the importance of any listed evaluation factor,[215] the failure to disclose the evaluation plan poses a real problem in determining whether this will be done. For example, "experience" might be considered by the agency to be a legitimate consideration under a number of evaluation factors.[216] Likewise, "staffing" was found to be a legitimate consideration under several evaluation subfactors.[217] The failure to disclose the plan also may deprive competitors of the knowledge that bonus or penalty points will be used in scoring.[218] It is particularly difficult to understand how an evaluation plan can be upheld as satisfying the requirements for full and open competition when the undisclosed plan allocated points for performance *exceeding* satisfactory compliance.[219] In upholding an undisclosed point scoring plan involving a brand-name-or-equal solicitation, the Comptroller General said:

> In a competitively negotiated brand name or equal solicitation, we consider unobjectionable comparative technical scoring where non-brand name equipment may receive a higher technical score than the brand name, if its performance is technically superior to the brand name. The solicitation here clearly put offerors on notice that offers would be comparatively evaluated on a point-scored basis, provided technical evaluation factors, and instructed offerors to indicate the extent to which the offered unit "meets or exceeds" the requirements. Consequently, we think it was unreasonable for the protester to assume that a proposal of the brand name would be scored equal to an offer possessing merit beyond the minimum requirements specified in the RFP. *See generally Computer Sciences Corp.*, B-189223, Mar. 27, 1978, 78-1 CPD ¶ 234. Thus, the fact that the protester may have been misled, while unfortunate, does not render the evaluation improper.[220]

Another problem in failing to disclose the evaluation plan is that competitors are unable to determine whether or not the plan will give the source selection official a clear understanding of the relative merits of proposals.[221] In one decision, the undisclosed evaluation plan had 10 separate evaluation factors with undisclosed point scores assigned to them for use by the evaluators. The undisclosed evaluation plan even reflected that the technical evaluators were to use a scoring guideline different from that to be used by the contracting officer, who was the source selection authority. The protest was sustained for other reasons, but disclosure of the evaluation plan initially in the solicitation could have resulted in amendments that would have avoided the issues.[222]

It is most difficult to understand why agencies are not required to disclose the scoring system to be used. Disclosure would eliminate the problems of determining the *relative* importance of evaluation factors for disclosure and the problems that will be caused by the new requirement in FASA (discussed below) to disclose when factors are "significantly" more or less important than cost. If the scoring system is valid, it should result in the Government receiving proposals more closely responsive to what it wants. If "technical" is rated 90 percent and cost is rated 10 percent, proposals will be structured in an entirely different manner than they will be if cost is 90 percent and technical factors are rated 10 percent. The only reasonable explanation is that the agencies want to use the "cafeteria plan" selection method of waiting to see what is offered before deciding on the definite scoring. The failure to disclose the evaluation method has an obvious and adverse impact on competition. By analogy to football, it is like having a tie game with one play left and you do not know how many points you will get if you score by running the ball, passing, or kicking a field goal. The Government will get much more "responsive" proposals if it discloses the scoring system.

The writer actually experienced this problem in trying to convince the chief procurement officer of a local public agency in the Dallas area to disclose the ratings to be used in evaluating the systems offered by competitors. After vague and indefinite answers, the writer asked, "Who knows what the scoring system will be?" The answer was: "Only the Shadow knows."

Undisclosed Evaluation Factors

Undisclosed evaluation *plans* prevent competitors from knowing how evaluation *factors* will be scored. Another significant reason that competition has been eroded is that government agencies do not disclose all of the evaluation factors and subfactors that will be scored or otherwise considered in the evaluation. This problem exists notwithstanding an absolute, unequivocal mandate from Congress that such factors be disclosed in solicitations.

Congress first required disclosure of evaluation factors in CICA, which requires solicitations to include "all significant factors (including price) which the executive agency reasonably expects to consider" in evaluating competitive proposals and their relative importance.[223] This provision was implemented in Federal Acquisition Circular 84-5 by providing, in FAR § 16.605(e), that solicitations clearly state the evaluation *factors* and any significant *subfactors* that will be considered in making source selections and their relative importance.[224] The Comptroller General's interpretations, however, emasculated the requirement by holding that agencies did not have to disclose areas or matters that were reasonably related to or encompassed by the disclosed criteria.[225] With respect to subfactors, the Comptroller General held that agencies did not have to disclose subfactors if they were "sufficiently related to the stated criteria so that offerors would reasonably expect them to be included in the evaluation" [226] or were "reasonably related" to the stated criteria and the "correlation is sufficient to put offerors on notice of the additional criteria to be applied." [227] The Comptroller General did not require evaluation subfactors to be revealed to competitors even in bid protest cases.[228]

Industry complained to the House Armed Services Committee that DOD often did not state evaluation factors and that it was difficult to understand what the Government really wanted. This resulted in an amendment to the Armed Services Procurement Act to expressly require that solicitations include a statement of all significant evaluation *subfactors* the agency expects to consider.[229] The committee report accompanying the bill said:

> In reviewing this issue the committee became cognizant of an issue that it also believed warranted attention—the quality of the department's statement in the solicitation of the factors on which it will base its source selection decision. Industry complained that the evaluation factors were often not stated or were not sufficiently detailed to allow offerors to understand what the department truly considered important. Without that knowledge they were left to structure offers that were often not consistent with the department's needs. The department, on the other hand, was concerned that if it were required to state in the solicitation the evaluation criteria, including all subfactors, and the weights that would be given those factors, the government would lose flexibility in choosing the best offer, and the subjective judgments it is often required to make would be challenged.
>
> The committee cannot stress enough the importance of the solicitation containing clear and unambiguous descriptions of each significant evaluation factor *and* its relative importance. This becomes even more significant if the department intends to award without discussion. The committee believes it can resolve both the industry and DOD concerns by amending section 2305 of title 10, United States Code, to require the department to include in its solicitations a statement of not only all significant evaluation factors, but all significant subfactors as well. Finally, it recommends an amendment to provide that in prescribing the evaluation factors, the department must clearly establish the relative importance of the factors included in the solicitation. The committee encourages the department to provide as much detail as possible in describing the significant evaluation factors and subfactors.[230]

The Comptroller General recognized that this meant the solicitation should contain "clear and unambiguous information concerning how offers will be evaluated." [231]

The Comptroller General, however, continues to hold that factors "encompassed by or related to," [232] or "which might be taken into account" [233] in evaluating, identified criteria need not be disclosed. With respect specifically to the disclosure of evaluation subfactors even by DOD agencies, the Comptroller General's position is that areas reasonably related to or encompassed by,[234] or "intrinsically related to," [235] the stated criteria do not have to be disclosed in the solicitation. Thus, the Comptroller General held that "risk" did not have to be disclosed as an evaluation factor or subfactor because consideration of risk is *inherent* in the evaluation of proposals.[236] The logical refutation of this position is that, under this view, subfactors *never* would have to be disclosed. *All* subfactors, by definition, are reasonably related to or encompassed by the primary factors (otherwise, they would not be *sub*factors).

The General Services Administration Board of Contract Appeals (GSBCA) takes a different view of the disclosure requirements. In sustaining a protest in which the Marine Corps did not disclose it was evaluating whether, and how much, an offeror's proposal *exceeded* the Government's needs (and to which a dollar value was assigned), the Board said:

> The Board has held that any factor which significantly contributes to how a potential offeror structures its proposal or which affects the selection of an awardee should be disclosed in the solicitation. *Systemhouse Federal Systems, Inc.*, GSBCA 9313-P, 88-2 BCA ¶ 20,603, at 104,122, 1988 BPD ¶ 33, at 13. The fact that SAC would be examining the technical proposals to determine whether they exceeded the requirements of the solicitation and would be assigning a dollar value to those elements is such a significant factor. Offerors may structure their proposals differently and may include additional features in their proposals based on this knowledge. The proposal an offeror submits based on the terms of this solicitation could be markedly different than the proposal which may have been submitted if the evaluation factors and cost savings adjustment had been disclosed. Thus, the fact that proposals would be examined to determine if they exceeded the requirements of the solicitation and the fact that a cost savings adjustment would be applied to those elements which exceeded the requirements should have been disclosed in the solicitation.[237]

The GSBCA's statement explains clearly how competition has been eroded by the failure to apply one of the most basic rules of competition; namely, stating *what* will be scored. It also should be clear that the procuring agencies are depriving themselves of higher quality proposals by failing to disclose all evaluation factors and subfactors. The awardee under the present system may merely be the offeror who had the best guess (or, worse, inside information) about what the Government *really* wanted. One of the best expressions of this argument was made by the Comptroller General in a case in which the statutory requirement to disclose evaluation factors was inapplicable:

> Intelligent competition assumes the disclosure of the evaluation factors to be used by the procuring agency in evaluating offers submitted and the relative importance of those factors.[238]

The current practices, it is submitted, are inconsistent with "intelligent competition."

Subjective and Unnecessary Evaluation Factors

One of the most important measures of the *quality* of competition is the *objectivity of the scoring*. There almost never is any doubt regarding the winner of a marathon race or a pole vault competition. What distinguishes these sports from professional wrestling? The answer is *rules and their enforcement*. The integrity of the competition is directly proportional to the objectivity of the scoring method. The less objective the scoring method, the more opportunity there is for the mischief that competition is intended to avoid (favoritism, fraud, overspending, etc.). The integrity of the competition requires *not only* that the judges are satisfied with the winner *but also* that the competitors believe that they have been treated fairly.

The quality of competition in government contracting has eroded due to the increased *number* as well as the increased *subjectivity* of evaluation factors. Subjective scoring permits the judges to postpone

deciding what they want until after the competitors have completed their participation. This, again, is the "cafeteria" selection method—you do not decide what you want until you go down the line with your tray. This selection method has a major flaw—we all tend to buy too much when we go through the buffet line. The same is true in government contracting; subjective evaluation permits the Government to pay more for what it purchases (under the euphemism of "best value," discussed below). When non-cost factors are evaluated along with price, a higher score in subjective factors costs the Government more money.

The Comptroller General has held that subjective evaluations are not improper; evaluation factors need only reflect the agency's actual needs.[239] A legitimate question, however, is whether many of the subjective evaluation factors currently being used in federal source selection really reflect the Government's actual needs. One offeror was downgraded because its proposal did not show any "creative or innovative thoughts," [240] and competitors in another procurement were rated for their "visionary" approaches.[241] In another competition, proposals were graded by the offerors' "academic credibility." [242] Proposals often are evaluated for the offerors' labor-management relations. One was downgraded in this area because the evaluators reported "several employees were disgruntled because [the offeror] refused to timely grant cost of living wage increases." [243] Another proposal was downgraded for containing insufficiently detailed strike/work stoppage procedures.[244] Proposals frequently are graded for the "oral presentation." [245] One proposal was found unacceptable because of the contractor's organizational chart.[246] A company's plans for quality control also frequently are evaluated,[247] and the Comptroller General has recognized that different evaluators will have different perceptions regarding the relative merits of proposed quality control plans.[248] However, when a proposal's quality control program is downgraded for an *undisclosed* requirement to include the Government's participation in the quality program, a more objective evaluation method is needed,[249] particularly where the evaluation plan assigns more weight to quality than to price.[250] Objective criteria are particularly important to describe the Government's actual needs in connection with the evaluation factor of customer satisfaction [251] (*i.e.*, how much "satisfaction" is enough).

It may be impossible, or at least undesirable, to eliminate subjectivity in all competitive acquisitions, such as the "aesthetic" evaluation factor for the design of a building [252] or the "visual impact" consideration for the design of a bridge.[253] However, some rules, standards, and guidelines for the use of subjective standards (none of which exist today in government procurement) *should* be established describing the types of factors permitted and the discriminators to be used in scoring. To analogize, there is subjectivity involved in evaluating gymnastics and diving competitors, but there are well-defined factors that are being evaluated and which are well known to all competitors.

Another reason competition in government procurement has eroded is that proposals are evaluated on the basis of factors that are remote to justifiable actual needs of the agencies. Comparative evaluations of a potential contractor based on the vesting period for its employees' 401(k) plan contributions,[254] the employee sick leave policy,[255] the part-time or full-time status of employees,[256] severance pay policy,[257] government contract experience,[258] the importance of the contract to the offeror,[259] and membership in professional organizations [260] seem hard to relate to the Government's actual needs. A comparative evaluation of offerors' minority business participation [261] can result in the Government paying a hidden price premium for socioeconomic programs. It also is doubtful that Congress recognizes that agencies may be paying a price premium in janitorial services for the contractor's corporate reputation, supervisor experience, organizational methods and techniques, and subcontracting plans.[262]

Some government requirements and evaluation factors may be imposing standards on government contractors that the Government does not, or could not, adopt for itself, such as employee dress and grooming standards,[263] employee personnel conduct and attire,[264] availability of conference room space,[265] pop-up dispensers for paper towels,[266] subsidized hot meal and beverage programs for employees,[267] and even evaluation of employees' political views.[268] Awarding government contracts based even in part on highly subjective, and possibly unnecessary, factors erodes and undermines competition for what the Government actually needs. Government requirements based on personal preferences are inappropriate.[269]

Responsibility-Type Evaluation Factors

In government contracting, the term "responsible" as applied to a prospective contractor has a well defined and consistently applied meaning; namely, a contractor that can and will perform the contract satisfactorily. To be "responsible," a prospective contractor must (a) have adequate financial resources or the ability to obtain them, (b) be able to comply with the delivery or performance schedule, (c) have a satisfactory performance record, (d) have a satisfactory record of integrity and business ethics, (e) have the necessary organization, experience, accounting and operational controls and technical skills, or the ability to obtain them, (f) have the necessary equipment and facilities, or the ability to obtain them, and (g) be otherwise qualified and eligible to receive award.[270] Responsibility determinations are made *after* preliminary source selection (*i.e.*, determination of low bidder or best evaluated proposal) and are a condition to all government purchases.[271] A prospective contractor must affirmatively demonstrate its responsibility, including (when necessary) the responsibility of its proposed subcontractors.[272]

An agency's consideration of the technical merits or acceptability of proposals traditionally has been separate and distinct from consideration of an offeror's responsibility.[273] However, the Comptroller General said:

> It is not always possible to draw a distinct line between the two concepts because often traditional responsibility matters are incorporated into technical evaluation criteria used in negotiated procurements, and where an agency uses traditibnal responsibility criteria to assess technical merit or acceptability, the technical evaluation may involve consideration of an offeror's capability as well as its proposed approach and resources.[274]

Nevertheless, the solicitation must advise offerors that traditional responsibility criteria will be *comparatively* evaluated.[275]

Examples of responsibility-type factors that have been used for *comparative* evaluation in source selection include (1) financial capability,[276] (2) production capability,[277] (3) facilities,[278] (4) equipment,[279] (5) staffing,[280] (6) purchasing system,[281] (7) production techniques,[282] (8) delivery schedule,[283] (9) schedule realism,[284] (10) business practices,[285] (11) safety,[286] (12) spare parts availability,[287] (13) knowledge of local law,[288] and (14) warranty.[289]

Two responsibility factors are particularly troublesome. The first is "corporate experience." It causes problems because the evaluation sometimes is limited to the corporate entity[290] while at other times it includes consideration of the corporation's officers and key personnel[291] and even subcontractors.[292] The second problematic responsibility factor is "risk." Solicitations sometimes delineate specific types of risk to be evaluated (*e.g.*, management, operational, technical, cost, and performance).[293] The Comptroller General holds, however, that risk is inherent in all evaluations of technical proposals.[294] Therefore, evaluation of risk is permitted in the same procurement as a separate evaluation factor and as a consideration in evaluating other factors.[295] Since "risk" has a negative value, another problem with this factor is how to evaluate the probability of negative events.[296]

The use of responsibility-type evaluation factors erodes competition and purchasing limitations by raising critical issues for both potential contractors and the Government. For potential vendors, the issue is "how much is enough?" Is this procurement worth the time, effort, and cost to compete? Will my financial resources, facilities, etc., be compared with those of General Motors, IBM, etc.? For the Government, an issue *should* be "how much is too much?" Will an offeror's $50 million in financial resources justify paying a price premium for janitorial services when compared with a proposed contractor with only $5 million in resources? There may even be a scale of points based on years of experience.[297] However, the issue is not how much the experience should be scored but how much is more than "enough." One proposal was rated superior partly because the offeror had 100 years of corporate experience.[298] In addition, there is always the question of whether the offeror had 10 years of experience or merely one year's experience 10 times. Competition is prejudiced because there is no statutory or regulatory guidance to limit the evaluation of responsibility factors to the amount or level

that is *adequate* for the performance of the contract. As the Comptroller General said when a protester claimed its superior financial condition deserved a higher score:

> The Navy did not rate [the protester's proposal] superior because, it explains, "it is hard to envision, let alone quantify, any added benefit to the agency resulting from massive revenues; [o]nce the financial condition and capability of an offeror is deemed to be sufficient to support performance of the contract, a rating of 'acceptable' is entirely appropriate." [299]

When the problem is raised, the Comptroller General points out that Congress has specifically recognized in 10 U.S.C. § 2305(a)(3) and 41 U.S.C. § 253a(c) that responsibility-related factors, such as management capability and prior experience, are appropriate considerations in assessing the quality of proposals.[300] However, these laws do not say the evaluation may be entirely subjective with no limitation to "adequacy."

Exceeding Government Requirements

Another circumstance that has had an adverse effect on competition and government purchasing limitations is that evaluation points are awarded for *exceeding* the Government's requirements set forth in the solicitation. The practice sometimes is expressed as little more than a differentiation that awards a higher score to a proposal that exceeds the minimum requirements than to one that merely meets the requirements.[301] The "cafeteria selection" nature of this approach was described as follows:

> We do not think that it is necessary or even practicable to assign specific weights in a solicitation to enhancements, the nature of which the agency cannot be aware of until they are actually proposed by an offeror. It is our view that such enhancements should be evaluated under the appropriate evaluation factor or subfactors in the solicitation and assigned the weight in the overall evaluation commensurate with the weight given to the factor or subfactor in the solicitation's evaluation scheme. Our view of the record indicates to us that this was done here.[302]

Solicitations sometimes advise competitors that their proposals will be given points for exceeding the requirements.[303] In other cases, the Comptroller General has held that the mere fact that the solicitation provides for comparative judgments of technical evaluation criteria is notice that an agency may rate one offeror higher than others for exceeding the requirements.[304] At other times, the source evaluation plan provides that points are earned only if a critical part exceeds the technical specifications.[305] Occasionally, the Comptroller General will hold that it is improper to award higher points for exceeding the requirements.[306] The practice is common, however, and examples of awarding higher scores for exceeding the solicitation requirements include performance capability,[307] equipment,[308] additional personnel,[309] and organization and staffing.[310]

Competitive evaluations that award points for exceeding the Government's requirements raise real questions as to whether there is genuine competition at all. It is difficult enough to compete to *meet* the requirements, but with undisclosed evaluation plans, undisclosed and subjective evaluation factors, etc., how can there be any meaningful competition to *exceed* the requirements? How much more than the requirements is desired (and will be awarded points)? In what areas are additional performance or capabilities desired? What will you be competing against? Finally, how can the Government justify paying a higher price for something that exceeds its actual needs as reflected by the specification requirements?

Best Value Procurements

The label "best value" procurement, although much in vogue today, neither broadens nor narrows the discretion agencies always have exercised in conducting cost/technical tradeoffs.[311] The practice sometimes is called "greatest value." [312] Essentially, it merely means that there is no requirement that the contract be awarded based on the low price,[313] and this subject could constitute a completely

separate topic for discussion.[314] The evaluation may be based on dividing the technical evaluation point score by the total proposed price to obtain a price/quality ratio.[315] This practice was a standard technique used in the Navy's technical evaluation manual for turnkey family housing at least as early as 1975.[316] Another "best value" evaluation factor also much in vogue today is "past performance." This topic likewise is too broad to cover here[317] and has many inherent problems, risks, and effects on competition. Past performance expressly contemplates paying a price premium based on evaluation of the types of factors previously discussed in this article.

The only illustration of the potential impact of this method on competition and purchasing limitations will be a hypothetical example of a solicitation by the General Services Administration for automobiles for the GSA motor pool. If the solicitation were issued on a "best value" basis with "technical" (defined as engineering, appearance, comfort, and warranty) rated 70% and cost 30%, it is possible that a Cadillac could win over a Ford or Chevrolet. This result would not mean, however, that the Government actually *needs* this higher cost transportation.

Impact on Small Business Concerns

One of the most serious erosions of competition (and perhaps the most subtle) has been the adverse impact of current procurement practices on small business concerns and minority enterprises. No small business concern may be precluded from award because of *nonresponsibility* without referral of the matter to the Small Business Administration (SBA) for a final determination (and *possible* issuance of a certificate of competency).[318] Application of responsibility-type evaluation factors on a pass/fail or go/no go basis that results in the elimination of a small business concern from competition without referral of the matter to the SBA is improper.[319] However, a proposal from a small business concern may be rejected as unacceptable based on a relative assessment of responsibility-type factors *without* a referral to the SBA.[320]

It is relatively easy, therefore, to eliminate small business concerns from competition merely by including responsibility-type evaluation factors in the solicitation and then comparing the small business concern's capabilities with much larger, more experienced companies (even if the greater capabilities or resources of the large businesses exceed the Government's actual needs). Examples of the *comparative evaluations* of responsibility-type factors that have resulted in small business concerns and minority enterprises being eliminated from competition for government contracts include (a) corporate experience,[321] (b) corporate resources,[322] (c) management capability,[323] (d) production capability,[324] (e) staffing for cost tracking and control,[325] (f) personnel experience,[326] (g) personnel qualifications,[327] (h) demonstrated expertise and capability,[328] and (i) management and staffing.[329] It bears noting that, in *not one* of these decided cases was a determination made that the small business concern was not capable of performing the contract satisfactorily. Rather, in each case someone else was *more* capable.

In recognition of the shaky ground on which the application of responsibility-type evaluation factors to small business concerns rests, agencies have been instructed how to structure the solicitation to avoid referrals to the SBA. The recent *Guide to Best Practices for Past Performance* issued by the Office of Federal Procurement Policy (Interim ed. May 1995) states at page 12:

> To make clear from the outset that past performance is being used as an evaluation factor, it should be included in the solicitation as a factor against which offerors' relative rankings will be compared. Agencies should avoid characterizing it as a minimum mandatory requirement in the solicitation. When used in this fashion—to make a "go/no go" decision as opposed to making comparisons among competing firms—it will be considered part of the responsibility determination. As such, it will be subject to review by the Small Business Administration under the Certificate of Competency process.

The effective elimination of small business concerns from competition excludes numerous qualified competitors and creates a subtle restriction on competition to larger, over-qualified competitors without

justifying that such a restriction is necessary to meet the Government's actual needs. Responsibility--type evaluation factors also favor the large businesses that already have the facilities, financial resources, etc., over the small business concerns that only have the "ability to obtain" them, as permitted under responsibility determinations.[330]

Previous administrations and congresses have wrestled with the problem of inducing government agencies to contract with small business concerns. In a memorandum for the Defense Secretary dated Feb. 6, 1961, President John F. Kennedy said:

> I note that Congress has once again criticized the Department of Defense for not giving more contracts to small business. This is an old complaint. I think it would be useful for you to have someone look into exactly how this is handled and whether it is possible for the Defense Department to put more emphasis on small business. If it isn't possible for us to do better than has been done in the past I think we should know about it. If it is possible for us to do better we should go ahead with it and I think we should make some public statements on it. Would you let me know about this? [331]

The most discouraging aspect of this problem is not that small business firms do not get the contracts but, rather, that the taxpayers are deprived of the benefit of the lower prices that presumably would result from their competition in the contracting process.

The Minimum Needs Doctrine

For over 100 years, one of the most significant restraints on government purchasing has been the so-called "minimum needs" doctrine. The restraint is grounded in the basic authority of the Government to make any purchases or contracts. All contracting authority of the Government must be derived from one of two possible sources; namely, (1) a statute expressly authorizing a contract to be made (a contract authorization act, which is rarely used), or (2) an appropriation of funds from which the authority to contract can be *implied* (which accounts for over 99% of all government purchases). This rule was explained in an 1897 decision of the Comptroller of the Treasury as being based on Section 3732 of the Revised Statutes, which stated that no contract or purchase could be made unless the same is authorized by law or is under an appropriation adequate for its fulfillment.[332] However, the *implied* authority extends only to expenditures which are necessary or incident to the purpose of the appropriation.[333] The theory is that it cannot be *implied* that Congress *intended* to confer authority to contract for more than the Government's *needs*. Indeed, the principle of law is that "a legal contract cannot be made now for articles the Government does not need." [334] This rule, therefore, was expressed as providing that the Government can only buy what it actually *needs*, not what it wants or *desires*.[335]

The rule was stated by the Comptroller General as follows:

> It has long been the rule, enforced uniformly by the accounting officers and the courts, that an appropriation of public moneys by the Congress, made in general terms, is available only to accomplish the particular thing authorized by the appropriation to be done. It is equally well established that public moneys so appropriated are available only for *uses reasonably and clearly necessary to the accomplishment of the thing authorized* by the appropriation to be done.[336]

(Emphasis added.) Likewise, there is no authority, under the doctrine, to include any provision in government contracts that is not *essential* to the accomplishment of the purpose of the appropriation under which the contract was made.[337] The Government's "needs" were required to be obtained at the "most reasonable prices obtainable." [338] Applying the doctrine, the Comptroller General held that requirements for automobiles with leatherette upholstery [339] and four camshaft bearings [340] exceeded the Government's minimum needs.

There still is an Anti-Deficiency Act,[341] which provides that an officer or employee of the Government cannot make contracts before an appropriation is made unless authorized by law. Without

a contract authorization act, the Government's authority to contract is still *implied* from the appropriation. The limitation to contracting only for the Government's *minimum* needs is included in the procurement regulations.[342] A contracting officer was quoted in one bid protest decision as referring to the "old adage" that the Government drives Chevrolets, not Cadillacs.[343]

The failure to apply the minimum needs doctrine has led to sharply reduced competition and erosion of the historical purchasing limitation. How has this occurred? The primary reason is that there is no effective way to "police" the limitation. The Comptroller General consistently holds that the contracting agency has the primary responsibility for determining its minimum needs and for determining whether an offered item will satisfy those needs.[344] This is described as *broad* discretion.[345] It is virtually impossible to challenge an agency's determination of its minimum needs in a bid protest environment. This has led to anticompetitive practices of undisclosed evaluation plans, undisclosed evaluation factors, proposals exceeding the solicitation's requirements, and comparative evaluation of responsibility factors. Failure to enforce the rule permits the Government to require services exceeding the standards in the private sector, such as a two-hour response time for Air Force housing for breakdown of air conditioning,[346] and clean shirts and pants every other day, personally tailored to the individual employee.[347]

Source Selection

The source selection process also undermines competition in contracting by the absence of rules, effective standards or practical enforcement. The process begins with the agency's source selection *plan*. As discussed above, agencies are not required to *disclose* the evaluation plan to competitors. In addition, the agencies are not *bound* by their own source evaluation plan because the plans are internal agency instructions and, as such, do not give outside parties any rights.[348] Even when the evaluation plan stated the evaluation would be performed by a "team" but actually was done by the chairman alone, the Comptroller General held there was no basis for questioning the award.[349] Likewise, the qualifications of the evaluators are not subject to challenge (absent fraud, bias, or conflict of interest) because their selection is within the discretion of the agency.[350] One decision stated:

> We observe that even if protester were able to establish with a preponderance of the evidence that the evaluators harbored a hidden favoritism towards Integraph, that alone would provide no basis for sustaining a protest at this time. We are all to some extent the product of our experiences and that alone hardly should be a sufficient basis for finding prejudice. So long as the evaluators are knowledgeable and professionally qualified — there is no allegation to the contrary — and fairly conduct their evaluations in accordance with valid criteria provided to them, it is irrelevant that circumstances beyond their control have provided them with a preponderance of experience with the equipment of one competitor.[351]

Challenges to the technical *qualifications* of evaluators will not be considered,[352] even when non-doctors were evaluating physicians.[353] In fact, the entire composition of the evaluation panel is within the agency's discretion.[354] The Comptroller General also recognizes that the individual evaluators have "disparate, subjective judgments on the relative strengths and weaknesses of a proposal,"[355] but this does not indicate that the evaluation was flawed.[356] The evaluators' point scores are not binding on the source selection official;[357] they are "merely aids for selection officials."[358] Even the scoring *method* in the evaluation plan is not binding on the source selection official.[359]

Source selection officials have "wide discretion" and are bound neither by the technical scores nor the source selection recommendations of the technical evaluators.[360] They have broad discretion in determining the manner and extent to which they will make use of technical and cost information and are subject "only to the tests of rationality and consistency with the established evaluation factors."[361] This means they are not bound even by the conclusions of the technical experts.[362]

The risk of this almost absolute discretion (subject only to consistency with the disclosed factors in the RFP, fraud, etc.)[363] is that there is no real "competition" when rules are neither *disclosed* nor

followed. It is hard to defend this process as true "competition" when the rules are not disclosed, are applied secretly, and are not binding when decisions are challenged. Source selection is an excellent example of where a bad rule may be better than no rule. As stated in one decision, the source selection authority was "proud to be known throughout the Defense Department for 'going by the book,' but apparently the book he goes by is not the FAR." [364] The mischief that can occur under this process could not be illustrated better than by the recent decision of the Eleventh Circuit in *Latecoere International, Inc. v. United States* [365] describing the "cheating" and "cooking the books" that had occurred in the improperly motivated manipulation of the evaluation ratings even though a bid protest previously had been denied by the Comptroller General.

Bid Protests

The general scope, benefits, and shortcomings of the bid protest system are beyond the scope of this article. The point will be made only briefly that *the bid protest system cannot establish effective rules of competition and, under the current rules, cannot enforce effective rules of competition.* The discretion granted to agencies in the selection process precludes an effective policing system. The Comptroller General, for example, generally reviews agency decisions in the source selection process only to see if they have any reasonable basis and are consistent with the solicitation. This standard of review applies to determining requirements,[366] minimum needs,[367] evaluation of proposals,[368] cost/technical tradeoffs,[369] the source selection decision,[370] and conflicts of interest.[371]

The Comptroller General's standards of review are even more difficult to overcome in decisions involving other issues, like composition of the evaluation board (requiring fraud, bad faith, conflict of interest, or actual bias),[372] bias (requiring convincing evidence of specific and malicious intent to injure the protester),[373] and bad faith (requiring virtually irrefutable evidence that the agency had specific and malicious intent to injure the protester).[374]

The standard of review of the GSBCA is broader because its review is *de novo*.[375] The GSBCA applies the same standard as it does to contracting officers' decisions under contract disputes procedures.[376] It will review information that was not available to the contracting officer.[377] Nevertheless, the Board has consistently held that, where the solicitation does not set forth specific weights to be applied in conducting cost/technical tradeoffs, agencies are accorded "great discretion" in determining which proposal is most advantageous to the Government.[378] Reviewing courts also recognize that contracting officers are entitled to exercise discretion upon a broad range of issues in source selection.[379] The point of this brief discussion is that the fundamental problems in eroding competition and purchasing limitations cannot be solved merely by modifications to the bid protest system. Congress must prescribe—or require agencies to prescribe—the rules, standards, and practices to obtain true competition.

Proposals to Limit Competition Requirements

Procurement Reform

There are several "procurement reform" proposals pending in Congress that would limit full and open competition. An analysis of these proposals is beyond the scope of this article. However, the proposals will be mentioned in this section with a few brief comments regarding the proposals as they may relate to the material discussed above. The current procurement reform proposals are directed toward having the Government adopt some of the purchasing practices used in the commercial marketplace. This reform movement began with Vice President Gore's *Report of the National Performance Review* issued on Sept. 7, 1993.[380] The Report said that the Government frequently purchases low-quality items, or even wrong items, that arrive too late or not at all. The Report concluded by saying that federal managers can buy 90 percent of what they need over the phone, from mail-order discounters.

The Administration's point person on this reform is Steven Kelman, Administrator of the Office of Federal Procurement Policy (OFPP). Mr. Kelman was a professor of public policy at Harvard University before his appointment to his current position. His views were expressed succinctly in his book, *Procurement and Public Management*, published before he took his current position.

> I, too, believe that the government often fails to get the most it can from its vendors. In contrast to the conventional view, however, I believe that the system of competition as it is typically envisioned and the controls against favoritism and corruption as they typically occur are more often the source of the problem than the solution to it. The problem with the current system is that public officials cannot use common sense and good judgment in ways that would promote better vendor performance. I believe that the system should be significantly deregulated to allow public officials greater discretion. I believe that the ability to exercise discretion would allow government to gain greater value from procurement.[381]

In view of the discussion in the previous sections of this article, it is respectfully suggested that the discretion to exercise "common sense and good judgment" is a two-edged sword. Discretion is uniformly permitted and upheld in the competitive source selection phase of government contracts, but many more procurement problems in source selection have been caused by the discretion public officials have exercised than by the lack of discretion.

Consider, for example, recent initiatives relative to reliance on a contractor's performance on previous contracts. FASA[382] states, in § 1091, that an offeror's past performance should be considered in awarding a contract and requires OFPP to establish policies and procedures for this purpose. To help implement the statute, OFPP issued a ***Best Practices Guide for Past Performance.***[383] This guide states that one of the major factors to be evaluated is customer (*i.e.*, government) satisfaction, which measures the "contractor's customer relations efforts" and "how well the contractor worked with the contracting officer."[384] This "improvement" and procurement reform, if not more carefully defined and used, could have an undesired impact on competition in contracting. One solicitation involved in a decision last year described past performance as including the offeror's *reputation* for reasonable and cooperative behavior.[385] In another decision, the references stated the protester was "difficult to work with," even though the protester contended it was being penalized principally for filing legitimate claims.[386] In a third case, the protester was downgraded for past performance based in part on a reference who stated he would not choose to contract with the protester again because "he found the negotiation of modifications with the protester to be difficult."[387] Do these cases suggest contractors will be downgraded for utilizing the remedies provided in standard government contract clauses? If so, there may be a short-term benefit to the Government, but the supply of potential vendors will eventually dwindle, to the detriment of competition.

The Competition Standard

A legislative proposal introduced in the House of Representatives on May 18, 1995, H.R. 1670,[388] would change the CICA "full and open competition" standard to one of "maximum practicable competition." The measure would define "maximum practicable competition" to mean that "a maximum number of responsible or verified sources (consistent with the particular Government requirement) are permitted to submit sealed bids or competitive proposals on the procurement."[389] The sponsors' analysis of the bill explained this change as follows:

> Subsection (a) would amend 10 USC 2304(a) governing armed services acquisitions to establish a new standard of competition for the acquisition of goods and services - "maximum practicable" competition. This would replace the current requirement that all sources be given the "right" to be considered for government contracts whether or not the source has a realistic chance of supplying goods or services of the requisite quality at a reasonable price. The new standard would permit the government to focus on a meaningful competition among sources who can meet or exceed the government's requirements. In order to parallel the new competition standard the subsection would also amend 10 USC 2304(g)(3) which sets forth the standard for the use of competition in the simplified procedures for acquisitions under the simplified acquisition threshold to provide that agencies obtain competition to the "extent practicable" consistent with the particular requirement solicited.

There was no explanation in the analysis of what "a maximum number" of sources would be, what standards would be used to determine that number, and how the determination would be made. It is rather obvious that a "maximum" number translates to a "limited" number, but what will be the permissible limits?

According to a summary of the bill, the Government no longer can afford competition for the sake of competition.[390] As discussed above, this never was a purpose of competition. Granting broad discretion to limit competitors no doubt will reduce the opportunity for the cost savings competition is presumed to obtain. Moreover, in view of the myriad permissible restrictions on competition currently available, one questions the desirability and even the necessity of additional legal authority to restrict competition.

A proposed amendment to the Fiscal Year 1996 National Defense Authorization Act offered during floor debate in the House of Representatives June 14, 1995, would have incorporated most of the provisions of H.R. 1670, including the change to "maximum practicable competition."[391] The DOD Inspector General opposed the proposed change in the competition standard.[392] However, an amendment to the proposed amendment superseded the proposed change and preserved the "full and open competition standard." The vote was 213 to 207, with 14 members not voting.[393] The sponsors of HR 1670 stated that they will continue to pursue the bill as a freestanding measure,[394] with a markup by the House Government Reform and Oversight Committee anticipated in late July. Thus, there could be another challenge to the full and open competition standard in the House. The Senate has yet to draft its version of acquisition reform legislation.

Another amendment to the defense bill adopted June 14 would require solicitations to include:

> a description, in as much detail as is practicable, of the source selection plan of the agency, or a notice that such plan is available upon request.[395]

The sponsor of this amendment stated that if companies are better informed about how offers will be evaluated, they will be better able to give the Government "exactly what it needs and at the best price."[396]

The Competitive Range for Discussions

The "competitive range" refers to the proposals of offerors selected by the contracting officer for written or oral discussions.[397] A proposal in the administration's pending acquisition reform legislation, the Federal Acquisition Improvement Act of 1995[398] (H.R. 1388, S. 669), would authorize limitations to be placed on the number of offerors in the competitive range. Sections 1012 and 1062 provide:

> If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(i) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of offerors in the competitive range to the greatest number of competitors that will permit an efficient award; provided that when the competition is limited for this purpose, the number of offerors may not be limited to less than three."

The bill analysis explained this provision as follows:

> This section would allow agencies to limit the number of offerors in the competitive range to no more than three when the contracting officer determines that such action would provide for efficiently making an award. After initially evaluating each offeror's proposal, agencies now, according to General Accounting Office (GAO) and General Services Administration Board of Contract Appeals (GSBCA) decisions, must look for the "natural break" in making a competitive range determination. If there is any question as to whether an offeror should be included in the competitive range, the offeror is kept in the competitive range. The result is that agencies generally

will not leave any offeror out of the competitive range unless that offeror clearly has no chance whatsoever of being awarded the contract.

This section would allow agencies to limit the number of offerors in the competitive range to three when the contracting officer determines that it is warranted by considerations of efficiency. In addition to enabling agencies to expedite the procurement process, limiting the size of the competitive range will allow offerors that do not have a real chance of receiving award to save time and money by being removed sooner rather than later.[399]

The immediate question raised by this provision is "What is efficient competition?" The next question is "Why is the provision necessary?"

The competitive range currently is defined to include "all proposals that have a reasonable chance of being selected for award."[400] The Comptroller General has held consistently that the determination of whether a proposal is within the competitive range is primarily within the contracting officer's discretion and will not be disturbed unless it is unreasonable.[401] The GSBCA has similarly said that the contracting officer has "broad discretion" in determining the competitive range, and the decision will not be disturbed unless it is "clearly unreasonable."[402] Thus, both GAO and the GSBCA review only for "reasonableness." Contracting officers' determinations of which proposals have a reasonable chance of award may be based on their "relative" standing to other proposals.[403] These determinations are really subjected to close scrutiny *only* where the result is a competitive range of *one*.[404] Even determinations resulting in a competitive range of *one* will not be disturbed in the absence of a clear showing that they are unreasonable.[405]

With the contracting officer's broad discretion recognized by both the Comptroller General and the GSBCA, and the test applied being only "reasonableness," why would a contracting officer *want* to exclude offerors that have a *reasonable chance* for award? When competitive "ranges" of one are routinely approved (albeit after "close scrutiny"), why is statutory authority to limit the number to three deemed necessary? It is difficult to see how "efficiency" could outweigh the benefits of competition.

An alternative approach is contained in an amendment to the defense bill adopted by the House June 14, which provides:

With respect to competitive proposals, the head of the agency may make a preliminary assessment of a proposal received, rather than a complete evaluation of the proposal and may eliminate the proposal from further consideration if the head of the agency determines the proposal has no chance for contract award.[406]

This provision would merely reflect an early exclusion from the competitive range and, essentially, would only confirm authority already exercised by contracting officers.[407]

Conclusion

Most of our problems of "efficiency" in acquisitions are caused not by competition but by the lack of competition or the poor quality of competition. When the goals or "requirements" are ambiguous, when there are no "rules" or the rules are not disclosed, and when selections are made based on vague, indefinite, and subjective standards, protests can be expected, and potential competitors are lost. Indeed, the public and taxpayers are fortunate in that the bid protest system provides a vehicle to expose the problems and serve as a protection against favoritism, excessive requirements, and other mischief. There is no more efficient way to "police" the procurement system than to have it done by the competitors themselves. They know the requirements, they know the government technical and contracts representatives, and they know one another. An army of auditors or inspectors general could not possibly perform "compliance reviews" as effectively as the bid protest system operates.

If Congress wants to reduce acquisition costs, attention should be directed toward *improving*, not reducing, competition. Training should be provided for those who plan for requirements and define the Government's needs in specifications and statements of work (which serve as the baseline for evaluating proposals). Standard evaluation factors, as objective as possible, should be established with required criteria for their application. Training should be provided for government technical personnel who evaluate proposals. Agencies should be required to recognize, or at least accept, that disclosing selection plans (and evaluation factors) and conducting source selections in the "purifying" sunlight will result in lower costs and fewer delays. Standards should be established for procurement officials, and those who are unwilling to accept the obligations of competition in source selection should be replaced. The monetary value of competition should be apparent from the Government's own studies cited earlier in this article.[408] If there is any remaining doubt regarding the benefits of competition, Congress should require all agencies to report each year all "competitive" awards that were not made to the offeror in the competitive range with the lowest price, and the amount of the difference. This should not be difficult because, if a proposal did not have a reasonable chance of being selected, it should have been excluded from the competitive range determination.

There are proposals today to reduce the "rules" in competition under the guise of efficiency and of affording more flexibility and discretion to contracting officials. It is interesting that the lack of "rules" has led to litigation in recent years in recreational sports, such as softball, touch football, and "pickup" basketball. In one softball game, a runner slid into home plate and injured the catcher.

> From that single play grew a six-year court battle that raised some unusual questions: Is sliding fair play? Is there a difference between "plowing" and "barreling" into another player? And what exactly did Ty Cobb mean when he said "the baseline belongs to the base runner?"[409]

Competition for government contracts is not a sport—it is a costly and serious business—but the problems of indefinite rules are applicable to both types of competition. *Reducing the "rules" may well reduce competition itself.* Each decision affecting the rules of competition affects the quality of competition. The lower the quality of competition, the more incidents of favoritism, collusion, fraud, and unnecessary expenditures can be expected. Before proposed "reforms" and "improvements" are embraced, careful attention should be paid to the fundamental rules of competition under which our procurement system has operated for nearly two centuries. We should look *backward* to the reasons for our traditional rules and *forward* to the impact and possible consequences of change.

There are even *contractors* who support reducing the rules of competition. They often do so, however, because they do not like, or will not accept, the "baggage" of government contract terms and conditions (which are not related to "competition"). These contractors should recall the colloquy between Sir Thomas More and Master Roper in the play *A Man For All Seasons*,[410] in which Roper is shocked that More would give the Devil the benefit of the law (which More said he would do for his own safety's sake). That colloquy is paraphrased (very loosely) below, with More now in the role of a government contractor.

Roper:
Would you want even your competitors to have the benefit of the rules of competition?

More:
Yes! What would *you* do? Cut a great road through the rules to obtain your government contracts?

Roper:
I'd cut down every procurement rule in the country to get my contracts.

More:
Oh? And when the last rule is gone and your competitors become the Government's favored suppliers, how could you get contracts then with all the rules eliminated?

Our procurement system is planted thick with rules. If you cut out the rules, do you really think you would have a chance of getting government contracts if you had no protection from arbitrary government action, undisclosed requirements, restrictive specifications, favoritism, political influences, inside information, conflicts of interest, and even fraud?

Yes, I want to keep the competition rules for my own business' sake.

Endnotes

[1] *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).
[2] *United States v. New York & Porto Rico Steamship Co.*, 239 U.S. 88, 93 (1915).
[3] *Ellis v. United States*, 206 U.S. 246, 256 (1907).
[4] H.R. Rep. No. 1157, 98th Cong., 2d Sess. 18 (1984), *quoted in Project Software & Development, Inc.*, GSBCA No. 8471-P, 86-3 BCA ¶ 19,082 at 96,413.
[5] Senate Committee on Government Affairs, S. Rep. No. 98-50, 98th Cong., 2d Sess. (1984), 1984 U.S. Code Cong. & Admin. News 2174-5. This view was also recently expressed in a letter dated June 13, 1995, from the Department of Defense Inspector General to Congressman William F. Clinger, Jr., 141 *Cong. Rec.* H5926 (daily ed. June 14, 1995).
[6] *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).
[7] *J. L. Manta, Inc. v. Braun*, 376 N.W.2d 466 (Minn. Ct. App. 1985); *accord Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951).
[8] *L & R Rail Service*, B-256341, June 10, 1994, 94-1 CPD ¶ 356 at 3.
[9] Title VII of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175 (1984).
[10] *Allfast Fastening Systems, Inc.*, B-251315, 93-1 CPD ¶ 266 (n.3 at 6).
[11] Statement of Thomas D. Morris, Assistant Secretary of Defense (Installations and Logistics), Sept. 2, 1962, to the Select Committee on Small Business, *The Role of Small Business in Government Procurement—1962-1963*, Hearings Before the Select Committee on Small Business 5, 87th Cong., 2d Sess. (Sept. 12, 1962).
[12] Background Material on Economic Aspects of Military Procurement and Supply, Joint Economic Committee of the Congress of the United States at 69, 88th Cong., 1st. Sess. (1963).
[13] *American Sterilizer Co.*, B-223493, Oct. 31, 1986, 86-2 CPD ¶ 503 at 4.
[14] S. Rep. No. 98-50, note 5, *supra* at 2176.
[15] *Id.*
[16] 1 Report of the Commission on Government Procurement 163-64 (Dec. 31, 1972).
[17] 2 Stat. 536 (1809).
[18] Sec. 10 of Act of March 2, 1861, 12 Stat. 214, 220.
[19] Revised Statutes of the United States § 3709 (1873-1874).
[20] 18 Comp. Gen. 285, 293 (1938); 10 Comp. Gen. 294, 301 (1931).
[21] 20 Comp. Gen. 903, 907 (1941); *See* 17 Comp. Gen. 789 (1938) ("free and open").
[22] 32 Comp. Gen. 384 (1953).
[23] *Quoted in* Nash & Cibinic, *Federal Procurement Law* 222, 230 (George Washington Univ., 2d ed. 1969).
[24] Title II of the First War Power Act, 55 Stat. 839 (1941).
[25] Letter dated January 13, 1947, from Acting Secretary of the Navy to the Speaker of the House of Representatives *included in* S. Rep. No. 571 (July 16, 1947), 2 U.S. Code Cong. Serv. 1048, 1075, 80th Cong., 2d Sess. (1948).
[26] 62 Stat. 21 (Feb. 19, 1948).
[27] *Id.*
[28] 70A Stat. 130 (1956).
[29] Letter dated Jan. 17, 1947, from Secretary of War to the Speaker of the House of Representatives *included in* S. Rep. No. 571, note 25, *supra*.
[30] S. Rep. No. 571 at 1, note 25, *supra*.
[31] 63 Stat. 377, 395 (June 30, 1949).
[32] S. Rep. No. 98-50 at 5, note 5, *supra*.
[33] *Id.* at 9.
[34] *Id.* at 17.
[35] CICA § 2711(a)(1), note 9, *supra*; 41 U.S.C. § 253.
[36] CICA § 2723(b), note 9, *supra*; 10 U.S.C. § 2305.
[37] 10 U.S.C. § 2305(a)(1)(B)(ii); 41 U.S.C. § 253a(a)(2)(B).
[38] Conference Report on the Deficit Reduction Act of 1984, H.R. Rep. No. 98-861, 98th Cong., 2d Sess. at 1429 (1984), 1984 U.S. Code Cong. & Admin. News 2117.
[39] *Id.* at 1422.
[40] *Id. See James LaMantia*, B-245287, Dec. 23, 1991, 91-2 CPD ¶ 574 at 23.
[41] Section 2731 of CICA amended the Office of Federal Procurement Policy Act, 41 U.S.C. § 403, to add these definitions.
[42] 41 U.S.C. § 418.
[43] *Businessland, Inc.*, GSBCA No. 8586-P-R, 86-3 BCA ¶ 19,288 at 97,513.
[44] 10 U.S.C. § 2304(c)(1); 41 U.S.C. § 253(c)(1); FAR § 6.302-1.
[45] *Id. See Ames-Avon Indus.*, B-227839.3, July 20, 1987, 87-2 CPD ¶ 71.

[46] FAR § 6.302-1(a)(2).
[47] 10 U.S.C. § 2304(c)(2); 41 U.S.C. § 253(c)(2); FAR § 6.302-2.
[48] 10 U.S.C. § 2304(e); 41 U.S.C. § 253(e).
[49] *Honeycomb Co.*, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209.
[50] *IMR Systems Corp.*, B-222465, July 7, 1986, 86-2 CPD ¶ 36.
[51] 10 U.S.C. § 2304(c)(3); 41 U.S.C. § 253(c)(3); FAR § 6.302-3. *See Propper International, Inc.*, B-229888, Mar. 22, 1988, 88-1 CPD ¶ 296.
[52] 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 253(c)(4); FAR § 6.302-4.
[53] *Kahn Indus., Inc.*, B-225491, Mar. 26, 1987, 87-1 CPD ¶ 343. *See Group Technologies Corp.*, B-250699, Feb. 17, 1993, 93-1 CPD ¶ 150.
[54] 10 U.S.C. § 2304(c)(5); 41 U.S.C. § 253(c)(5); FAR § 6.302-5.
[55] FAR § 6.302-5.
[56] 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 253(c)(6); FAR § 6.302-6.
[57] *Federal Labs Systems*, B-224258, Feb. 4, 1987, 87-1 CPD ¶ 111.
[58] 10 U.S.C. § 2304(c)(7); 41 U.S.C. § 253(c)(7); FAR § 6.302-7.
[59] *Acumenics Research & Technology, Inc.*, B-224702, Aug. 5, 1987, 87-2 CPD ¶ 128.
[60] 10 U.S.C. § 2304(g); 41 U.S.C. § 253(g). *See Omni Elevator Co.*, B-246393, Mar. 6, 1992, 92-1 CPD ¶ 264; *see also Helitune, Inc.*, B-243617.2, Mar. 16, 1992, 92-1 CPD ¶ 285.
[61] *Tecom Industries, Inc.*, B-236371, Dec. 5, 1989, 89-2 CPD ¶ 516.
[62] S. Rep. No. 571, 2 U.S. Code Cong. Serv. 1048, 1064, 80th Cong., 2d Sess. (1948); H.R. Rep. No. 670, 2 U.S. Code Cong. Serv. 1475, 1498, 81st Cong., 1st Sess. (1949).
[63] FAR Part 14.
[64] FAR Part 15.
[65] S. Rep. No. 98-50, 98th Cong., 2d Sess. (1984), 1984 U.S. Code & Admin. News 2174, 2191.
[66] Note 40, *supra*, and accompanying text.
[67] Note 38, *supra*, and accompanying text.
[68] Source selection procedures are designed to "maximize competition." FAR § 15.603(a).
[69] *CRC Systems, Inc.*, GSBCA No. 9385-P, 88-2 BCA ¶ 20,665 at 104,436; *NUS Corp.*, B-221863, June 20, 1986, 86-1 CPD ¶ 574; *Descomp, Inc.*, B-220085.2, Feb. 19, 1986, 86-1 CPD ¶ 172.
[70] *Military Waste Management, Inc.*, B-240769.3, Feb. 7, 1991, 91-1 CPD ¶ 135.
[71] *DSI, Inc.*, GSBCA No. 8568-P, 87-1 BCA ¶ 19,407.
[72] Note 37, *supra*.
[73] *Allfast Fastening Systems, Inc.*, B-251315, Mar. 25, 1993, 93-1 CPD ¶ 266 at 5; *Pacific Scientific Co.*, B-231175, Aug. 30, 1988, 88-2 CPD ¶ 193.
[74] *See, e.g., James LaMantia*, B-245287; Dec. 23, 1991, 91-2 CPD ¶ 574; *Kahr Bearing*, B-228550.2, Feb. 25, 1988, 88-1 CPD ¶ 192; *Packaging Corp.*, B-225823, July 20, 1987, 87-2 CPD ¶ 65.
[75] *Trimble Navigation, Ltd.*, B-247913, July 13, 1992, 92-2 CPD ¶ 17.
[76] 41 U.S.C. § 403(7)(B); *Transtar Aerospace, Inc.*, B-239467, Aug. 16, 1990, 902 CPD ¶ 134.
[77] *Old Dominion Security*, ASBCA No. 40062, 91-3 BCA ¶ 24,173 at 120,918.
[78] *North American Reporting, Inc.*, B-198448, Nov. 18, 1980, 80-2 CPD ¶ 364.
[79] 39 Comp. Gen. 570 (1960). *Accord* 51 Comp. Gen. 518 (1972) (solicitation permitting deviations from specifications do not "generally" permit free and equal competitive bidding).
[80] 10 U.S.C. § 2305(a)(1)(A)(i) and (B)(i); 41 U.S.C. § 253a(a)(1)(A) and (2)(B).
[81] *Adventure Tech, Inc.*, B-253520, Sept. 29, 1993, 93-2 CPD ¶ 202.
[82] *Bishop Contractors, Inc.*, B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555; n.2 at 3.
[83] *CPT Corp.*, GSBCA No. 8134-P-R, Jan. 28, 1986, 86-1 BCA ¶ 18,727 at 94,239.
[84] *Container Products Corp.*, B-255883, April 13, 1994, 94-1 CPD ¶ 255.
[85] 10 U.S.C. § 2305(b)(1); 41 U.S.C. § 253b(a).
[86] *Aydin Corp.*, B-227817, Sept. 28, 1987, 87-2 CPD ¶ 306.
[87] *Resource Consultants, Inc.*, GSBCA No. 8342-P, April 17, 1986, 86-2 BCA ¶ 18,942 at 95,677.
[88] 10 U.S.C. § 2305(a)(2); 41 U.S.C. § 253a(b).
[89] Pub. L. No. 103-355 (Oct. 13, 1994), 108 Stat. 3243, §§ 1011 and 1061.
[90] 10 U.S.C. § 2305(b); 41 U.S.C. § 253b(c) and (d).
[91] *Vac-Hyd Corp.*, B-216840, July 1, 1985, 85-2 CPD ¶ 2.
[92] *Professional Data Systems*, GSBCA No. 8475-P, 86-3 BCA ¶ 19,083 at 96,422.
[93] *Abel Converting Co.*, B-229065, Jan. 15, 1988, 88-1 CPD ¶ 40.
[94] *Uniform Rental Services*, B-228293, Dec. 9, 1987, 87-2 CPD ¶ 571. *Accord Abel Converting Co.*, note 93, *supra*.
[95] *W. H. Smith Hardware Co.—Recon.*, B-222045.2, July 1, 1986, 86-2 CPD ¶ 1.
[96] *Cycad Corp.*, B-255870, April 12, 1994, 94-1 CPD ¶ 253; *Engine & Generator Rebuilders*, B-220157, Jan. 13, 1986, 86-1 CPD ¶ 27.
[97] *Julie Research Laboratories, Inc.*, GSBCA No. 9474-P, 88-3 BCA ¶ 20,966 at 105,954-55. The Comptroller General also expressed this view, saying: "it would seem that necessarily all specifications are restrictive in the sense that the requirements they establish, whether reasonable or not, preclude the purchase of nonconforming items . . . ." Unpub. Comp. Gen. B-168278 (Mar. 30, 1970).
[98] 1 Comp. Dec. 363, 364 (April 10, 1895).
[99] *Harbor Branch Oceanographic Institution, Inc.*, B-243417, July 17, 1991, 91-2 CPD ¶ 67.

[100] *ViON Corp.*, B-256363, June 15, 1994, 94-1 CPD ¶ 373. In this case, the Comptroller General held that the language of the specification did not express the agency's minimum needs and was "overly restrictive."
[101] *Science Pump Corp.*, B-255803, April 4, 1994, 94-1 CPD ¶ 227.
[102] *Integrated Systems Group, Inc. v. Department of the Army*, GSBCA No. 12417P, 94-1 BCA ¶ 26,273 at 130,716.
[103] *Argus Research Corp.*, B-249055, Oct. 20, 1992, 92-2 CPD ¶ 260.
[104] *Id.*
[105] *Keeson, Inc.*, B-245625, Jan. 24, 1992, 92-1 CPD ¶ 108.
[106] FAR § 9.201. The use of the qualified products list is inherently restrictive of competition and may be used only where the application is not unnecessarily restrictive. *McGean-Rohco, Inc.*, B-218616, Aug. 7, 1985, 85-2 CPD ¶ 140.
[107] *Stevens Technical Services, Inc.*, B-250515.2, May 17, 1993, 93-1 CPD ¶ 385, n.8.
[108] *Tura Machine Co.*, B-241426, Feb. 4, 1991, 91-1 CPD ¶ 114.
[109] *Interstate Diesel Services, Inc.*, B-230107, May 20, 1988, 88-1 CPD ¶ 480.
[110] *Goodyear Tire & Rubber Co.*, B-247363.6, Oct. 23, 1992, 92-2 CPD ¶ 315.
[111] 10 U.S.C. § 2319; 41 U.S.C. § 253c.
[112] *Advanced Seal Technology, Inc.*, B-249855.2, Feb. 15, 1993, 93-1 CPD ¶ 137; *BWC Technologies, Inc.*, B-242734, May 16, 1991, 91-1 CPD ¶ 474.
[113] *Alpha Technical Services, Inc.*, B-251147, Mar. 15, 1993, 93-1 CPD ¶ 234.
[114] *Electro-Methods, Inc.*, B-255023.3, Mar. 4, 1994, 94-1 CPD ¶ 173.
[115] *Advanced Seal Technology, Inc.*, note 112, *supra.*
[116] *Lambda Signatics, Inc.*, B-257756, Nov. 7, 1994, 94-2 CPD ¶ 175; *Sargent & Greenleaf, Inc.*, B-255604.3, Mar. 22, 1994, 94-1 CPD ¶ 208.
[117] *Iowa-Illinois Cleaning Co.*, B-254805, Jan. 18, 1994, 94-1 CPD ¶ 22.
[118] *PBSI Corp.*, B-227897, Oct. 5, 1987, 87-2 CPD ¶ 333.
[119] *Cobra Technologies, Inc.*, B-249323, Oct. 30, 1992, 92-2 CPD ¶ 310; *Roger E. Herbst*, B-244773, Nov. 19, 1991, 91-2 CPD ¶ 476.
[120] *Remtech, Inc.*, B-240402.5, Jan. 4, 1991, 91-1 CPD ¶ 35; *J & J Maintenance, Inc.*, B-239035, July 16, 1990, 90-2 CPD 35. *See Taina U.S. Inc.*, B240892, Dec. 21, 1990, 90-2 CPD ¶ 517 (continuous operation merely "necessary").
[121] *Aspen Cleaning Corp.*, B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289.
[122] *Maintrac Corp.*, B-251500, Mar. 22, 1993, 93-1 CPD ¶ 257.
[123] *Triple P Services, Inc.*, B-249443, Oct. 30, 1992, 92-2 CPD ¶ 313.
[124] *The Sequoia Group, Inc.*, B-252016, May 24, 1993, 93-1 CPD ¶ 405.
[125] *Resource Consultants, Inc.*, B-255053, Feb. 1, 1994, 94-1 CPD ¶ 59.
[126] *Allfast Fastening Systems, Inc.*, B-251315, Mar. 25, 1993, 93-1 CPD ¶ 266.
[127] *Space Vector Corp.*, B-253295.2, Nov. 8, 1993, 93-2 CPD ¶ 273.
[128] *Titan Dynamics Simulations, Inc.*, B-257559, Oct. 13, 1994, 94-2 CPD ¶ 139; *Institutional Communications Co.*, B-233058.5, Mar. 18, 1991, 91-1 CPD ¶ 292.
[129] *Electro-Methods, Inc.*, B-239141.2, Nov. 5, 1990, 90-2 CPD ¶ 363.
[130] *Batch-Air, Inc.*, B-204574, Dec. 29, 1981, 81-2 CPD ¶ 509.
[131] *TLC Services, Inc.*, B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.
[132] *Astro-Valcour, Inc.*, B-257485, Oct. 6, 1994, 94-2 CPD ¶ 129.
[133] *Precision Photo Laboratories Inc.*, B-251719, April 29, 1993, 93-1 CPD ¶ 359.
[134] *The Sequoia Group, Inc.*, B-252016, May 24, 1993, 93-1 CPD ¶ 405.
[135] *National Customer Engineering*, B-251135, Mar. 11, 1993, 93-1 CPD ¶ 225.
[136] *Eastern Trans-Waste Corp.*, B-214805, July 30, 1984, 84-2 CPD ¶ 126.
[137] *Southwestern Bell Telephone Co.*, B-231822, Sept. 29, 1988, 88-2 CPD ¶ 300.
[138] *ucson Mobilephone, Inc.*, B-256802, July 27, 1994, 94-2 CPD ¶ 45.
[139] *Chicago City Wide College*, B-218433, Aug. 6, 1985, 85-2 CPD ¶ 133; *Chicago City-Wide College*, B-212274, Jan. 4, 1984, 84-1 CPD ¶ 51.
[140] *Allfast Fastening Systems, Inc.*, B-251315, Mar. 25, 1993, 93-1 CPD ¶ 266.
[141] *D. Moody & Co.*, B-185647, Sept. 1, 1976, 76-2 CPD ¶ 211.
[142] *Vac-Hyd Corp.*, B-216840, July 1, 1985, 85-2 CPD ¶ 2.
[143] *King-Fisher Co.*, B-256849, July 28, 1994, 94-2 CPD ¶ 62; *Tek Contracting, Inc.*, B-245590, Jan. 17, 1992, 92-1 CPD ¶ 90.
[144] *Talon Manufacturing Co.*, B-257536, Oct. 14, 1994, 94-2 CPD ¶ 140.
[145] *G. H. Harlow Co.*, B-254839, Jan. 21, 1994, 94-1 CPD ¶ 29.
[146] *I.T.S. Corp.*, B-243223, July 15, 1991, 91-2 CPD ¶ 55.
[147] *Marine Transport Lines, Inc.*, B-224480.5, July 27, 1987, 87-2 CPD ¶ 91.
[148] *Software City*, B-217542, April 26, 1985, 85-1 CPD ¶ 475.
[149] *Marlen C. Robb & Son, Boatyard & Marina, Inc.*, B-256516, June 28, 1994, 94-1 CPD ¶ 392.
[150] *Microwave Radio Corp.*, B-227962, Sept. 21, 1987, 87-2 CPD ¶ 288.
[151] *GE American Communications, Inc.*, B-248575, Sept. 4, 1992, 92-2 CPD ¶ 155; *Yale Materials Handling Corp.*, B-230209, Mar. 23, 1988, 88-1 CPD ¶ 302.
[152] *AAA Engineering & Drafting, Inc.*, B-237383, Jan. 22, 1990, 90-1 CPD ¶ 87; *Shoney's Inn*, B-231113, June 24, 1988, 88-1 CPD ¶ 609.
[153] *Westcott General*, B-241570, Feb. 5, 1991, 91-1 CPD ¶ 120.
[154] *NFI Management Co.*, B-240788, Dec. 12, 1990, 90-2 CPD ¶ 484.
[155] *Canal Claiborne Ltd.*, B-244211, Sept. 23, 1991, 91-2 CPD ¶ 266.

[156] *Pamela A. Lambert*, B-227849, Sept. 28, 1987, 87-2 CPD ¶ 308.
[157] *CardioMetrix*, B-250247, Dec. 14, 1992, 92-2 CPD ¶ 414.
[158] *Leo Kanner Assoc.*, B-194327, Nov. 5, 1979, 79-2 CPD ¶ 318. *See Bartow Group*, B-217155, Mar. 18, 1985, 85-1 CPD ¶ 320.
[159] *Anglo American Auto Auctions, Inc.*, B-242538, April 29, 1991, 91-1 CPD ¶ 416.
[160] *Days Inn Marina*, B-254913, Jan. 18, 1994, 94-1 CPD ¶ 23.
[161] *Ramada Inn of Des Moines*, B-233504, Feb. 6, 1989, 89-1 CPD ¶ 123.
[162] *Blaine Hudson Printing*, B-247004, April 22, 1992, 92-1 CPD ¶ 380.
[163] *Pacific Bell Telephone Co.*, B-231403, July 27, 1988, 88-2 CPD ¶ 93.
[164] *Pacific Architects & Engineers Inc.*, B-240310, Nov. 2, 1990, 90-2 CPD ¶ 359.
[165] *Computer Maintenance Operations Services*, B-255530, Feb. 23, 1994, 94-1 CPD ¶ 170; *G. S. Link & Assocs.*, B-229604, Jan. 25, 1988, 88-1 CPD ¶ 70.
[166] *Phillips Cartner & Co.*, B-224370.2, Oct. 2, 1986, 86-2 CPD ¶ 382.
[167] *Chi Corp.*, B-224019, Dec. 3, 1986, 86-2 CPD ¶ 634.
[168] *Id.*
[169] *Libby Corp.*, B-220392, Mar. 7, 1986, 86-1 CPD ¶ 227.
[170] 10 U.S.C. § 2304(e); 41 U.S.C. § 253(e).
[171] *Immunalysis/Diagnostixx of California Corp.*, B-254386, Dec. 8, 1993, 93-2 CPD ¶ 309.
[172] *Sargent & Greenleaf, Inc.*, B-255604.3, Mar. 22, 1994, 94-1 CPD ¶ 208; *Colbar, Inc.*, B-230754, June 13, 1988, 88-1 CPD ¶ 562.
[173] *DOD Contracts, Inc.*, B-250603.2, Mar. 3, 1993, 93-1 CPD ¶ 195.
[174] *Equa Industries, Inc.*, B-257197, Sept. 6, 1994, 94-2 CPD ¶ 96.
[175] *AUL Instruments, Inc.*, B-186319, Sept. 1, 1976, 76-2 CPD ¶ 212.
[176] *Camar Corp.*, B-253016, Aug. 11, 1993, 93-2 CPD ¶ 94.
[177] *Bironas, Inc.*, B-249428, Nov. 23, 1992, 92-2 CPD ¶ 365; *Constantine N. Polites & Co.*, B-239389, Aug. 16, 1990, 90-2 CPD ¶ 132; *M. C. & D. Capital Corp.*, B225830, July 10, 1987, 87-2 CPD ¶ 32.
[178] *Fry Communications, Inc.*, B-220451, Mar. 18, 1986, 86-1 CPD ¶ 265.
[179] *Pem All Fire Extinguisher Corp.*, B-231478, July 27, 1988, 88-2 CPD ¶ 95.
[180] *Coastal Computer Consultants Corp.*, B-253359, Sept. 7, 1993, 93-2 CPD ¶ 155.
[181] *DGS Contract Services, Inc.*, B-249845.2, Dec. 23, 1992, 92-2 CPD ¶ 435.
[182] *Coastal Computer Consultants Corp. v. Department of Commerce*, GSBCA No. 12869-P, 94-3 BCA ¶ 27,151; *InSyst Corp.*, GSBCA No. 9946-P, 89-2 BCA ¶ 21,782.
[183] *Lionhart Group, Ltd.*, B-257715, Oct. 31, 1994, 94-2 CPD ¶ 170.
[184] *Procurement: Better Compliance With the Competition in Contracting Act Is Needed*, GAO/NSIAD-87-145 (Aug. 26, 1987).
[185] *Procurement: Efforts Still Needed to Comply With the Competition in Contracting Act*, GAO/NSIAD-90-104 (May 1990).
[186] *American Sterilizer Co.*, B-223493, Oct. 31, 1986, 86-2 CPD ¶ 503.
[187] *Defense Inventory: Extent of Diminishing Manufacturing Sources Problems Still Unknown*, GAO/NSIAD-95-85 at 1 (April 1995).
[188] *Id.* at 1-2.
[189] *East West Research, Inc.*, B-239919, Aug. 28, 1990, 90-2 CPD ¶ 172; *Nasuf Construction Corp.—Recon.*, B-219733.2, Mar. 18, 1986, 86-1 CPD ¶ 263.
[190] 10 U.S.C. § 2305(a)(1)(A)(iii); 41 U.S.C. § 253a(a)(1)(C); FAR § 10.004(a)(1).
[191] *Maremont Corp.*, B-186276, Aug. 20, 1976, 76-2 CPD ¶ 181.
[192] Note 79, *supra*, and accompanying text.
[193] *Triple P Services, Inc.*, B-220437.3, April 3, 1986, 86-1 CPD ¶ 318.
[194] *Arthur Young & Co.*, B-216643, May 24, 1985, 85-1 CPD ¶ 598.
[195] *Federal Computer Corp.*, B-223932, Dec. 10, 1986, 86-2 CPD ¶ 665.
[196] *Communications Corps, Inc.*, B-179994, April 3, 1974, 74-1 CPD ¶ 168.
[197] *Consolidated Devices, Inc.—Recon.*, B-225602.2, April 24, 1987, 87-1 CPD ¶ 437.
[198] *See Interface Flooring Systems, Inc.*, B-225439, Mar. 4, 1987, 87-1 CPD ¶ 247.
[199] *Harris Corp.*, B-217174, April 22, 1985, 85-1 CPD ¶ 455.
[200] *Express Signs International*, B-227144, Sept. 14, 1987, 87-2 CPD ¶ 243; *Korean Maintenance Co.*, B-223780, Oct. 2, 1986, 86-2 CPD ¶ 379.
[201] *ACRAN, Inc.*, B-225654, May 14, 1987, 87-1 CPD ¶ 509 at 7-8.
[202] *Parker's Mechanical Contractors, Inc.*, ASBCA No. 32842, 88-1 BCA ¶ 20,472. *Accord Electrical Contracting Corp. of Guam, Inc.*, ASBCA No. 33136, 90-3 BCA ¶ 22,974.
[203] *Loral Fairchild Corp.*, B-242957, June 24, 1991, 91-1 CPD ¶ 594.
[204] Note 185, *supra*, at 7.
[205] *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993); *Technocratica*, ASBCA No. 44134, 94-2 BCA ¶ 26,606.
[206] *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988).
[207] *Henry Shirek*, ASBCA No. 28414, 86-1 BCA ¶ 18,560.
[208] *Premiere Vending*, B-256437, June 23, 1994, 94-1 CPD ¶ 380; *U.S. Defense Systems, Inc.*, B-251544, Mar. 30, 1993, 93-1 CPD ¶ 279.
[209] See notes 88 and 89, *supra*, and accompanying text.
[210] *C3, Inc.*, B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279.
[211] *G. Marine Diesel*, B-232619, Jan. 27, 1989, 89-1 CPD ¶ 90.

[212] *PCB Piezotronics, Inc.*, B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286; *A. J. Fowler Corp.*, B-233326, Feb. 16, 1989, 89-1 CPD ¶ 166.

[213] FAR § 15.605(e); *North-East Imaging, Inc.*, B-256281, June 1, 1994, 94-1 CPD ¶ 332; *Lewis & Smith Construction Co.*, B-253382, Sept. 8, 1993, 93-2 CPD ¶ 150; *T. H. Taylor, Inc.*, B-227143, Sept. 15, 1987, 87-2 CPD ¶ 252.

[214] *Mandex, Inc.*, B-241759, Mar. 5, 1991, 91-1 CPD ¶ 244; *Accord Essex Electro Engineers, Inc.*, B-252288.2, July 23, 1993, 93-2 CPD ¶ 47.

[215] *J. A. Jones Management Services, Inc.*, B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244.

[216] *Teledyne Brown Engineering*, B-258078, Dec. 6, 1994, 94-2 CPD ¶ 223.

[217] *Loral Aerospace Corp.*, B-258817, Feb. 21, 1995, 95-1 CPD ¶ 97.

[218] *Chadwick-Helmuth Co.*, B-238645.2, Nov. 19, 1990, 90-2 CPD ¶ 400.

[219] *Princeton Gamma-Tech, Inc.*, B-228052.2, Feb. 17, 1988, 88-1 CPD ¶ 175. The Request for Proposals said proposals must reflect if the product "meets or exceeds" the specifications, but it did not indicate points would be scored for exceeding the performance requirements.

[220] *Astrophysics Research Corp.*, B-228718.3, Feb. 18, 1988, 88-1 CPD ¶ 167 at 4.

[221] *See Able-One Refrigeration, Inc.*, B-244695, Oct. 28, 1991, 91-2 CPD ¶ 384; *Power Conversion, Inc.*, B-239301, Aug. 20, 1990, 90-2 CPD ¶ 145.

[222] *American Development Corp.*, B-251876.4, July 12, 1993, 93-2 CPD ¶ 49.

[223] CICA § 2711(a)(1), 2723, note 9, *supra*.

[224] 50 Fed. Reg. 1726, 1740 (Jan. 11, 1985).

[225] *Hydroscience, Inc.*, B-227989, Nov. 23, 1987, 87-2 CPD ¶ 501; *Engineering Consultants & Publications—Recon.*, B-225982.5, June 16, 1987, 87-1 CPD ¶ 598.

[226] *Coopers & Lybrand*, B-224213, Jan. 30, 1987, 87-1 CPD ¶ 100.

[227] *Hoffman Management, Inc.*, B-238752, July 6, 1990, 90-2 CPD ¶ 15.

[228] *Ward/Hall Associates AIA*, B-226714, June 17, 1987, 87-1 CPD ¶ 605.

[229] Section 802(a), National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 105 Stat. 1588 (Nov. 5, 1990), *amended by* 10 U.S.C. § 2305(a)(2)(A).

[230] H.R. Rep. No. 101-665, 101st Cong., 2d Sess. 1990 U.S. Code Cong. & Admin. News 2931, 3029.

[231] *Macro Service Systems, Inc.*, B-246103, Feb. 19, 1992, 92-1 CPD ¶ 200.

[232] *DeLima Assoc.*, B-258278.2, Dec. 20, 1994, 94-2 CPD ¶ 253.

[233] *Avogadro Energy Systems*, B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229.

[234] *Teledyne Brown Engineering*, B-258078, Dec. 6, 1994, 94-2 CPD ¶ 223; *Specialized Technical Services, Inc.*, B-247489.2, June 11, 1992, 92-1 CPD ¶ 510.

[235] *Information Systems Networks, Inc.*, B-254384.3, Jan. 21, 1994, 94-1 CPD ¶ 27.

[236] *Information Spectrum, Inc.*, B-256609.3, Sept. 1, 1994, 94-2 CPD ¶ 251.

[237] *System Resources, Inc. v. Department of the Navy*, GSBCA No. 12536-P, 94-1 BCA ¶ 26,388 at 131,282.

[238] *Richard S. Cohen*, B-256017.4, June 27, 1994, 94-1 CPD ¶ 382 at 6.

[239] *Sunbelt Properties, Inc.*, B-249469, Nov. 17, 1992, 92-2 CPD ¶ 353.

[240] *Scientex Corp.*, B-238689, June 29, 1990, 90-1 CPD ¶ 597.

[241] *Eagle Research Group, Inc.*, B-230050, May 13, 1988, 88-1 CPD ¶ 123.

[242] *White Water Assocs., Inc.*, B-244467, Oct. 22, 1991, 91-2 CPD ¶ 356.

[243] *donald clark Assocs.*, B-253387, Sept. 15, 1993, 93-2 CPD ¶ 168 at 4.

[244] *A & W Maintenance Services, Inc.*, B-255711, Mar. 25, 1994, 94-1 CPD ¶ 214.

[245] *See, e.g., N W Ayer Inc.*, B-248654, Sept. 3, 1992, 92-2 CPD ¶ 154.

[246] *Colbar, Inc.*, B-227555.4, Feb. 19, 1988, 88-1 CPD ¶ 168.

[247] *See, e.g., S and T Services*, B-252359, June 15, 1993, 93-1 CPD ¶ 464; *Cook Travel*, B-238527, June 13, 1990, 90-1 CPD ¶ 571.

[248] *Centex Construction Co.*, B-238777, June 14, 1990, 90-1 CPD ¶ 566.

[249] *Telos Field Engineering*, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240.

[250] *See Telos Field Engineering*, B-251384, Mar. 26, 1993, 93-1 CPD ¶ 271.

[251] *See Telos Field Engineering*, note 249, *supra*; *S & G Industries, Inc.*, B255263, Feb. 1, 1994, 94-1 CPD ¶ 81.

[252] *SDA Inc.*, B-256075, May 2, 1994, 94-2 CPD ¶ 71.

[253] *Bell Free Contractors, Inc.*, B-227576, Oct. 30, 1987, 87-2 CPD ¶ 418.

[254] *Bionetics Corp.*, B-258106, Dec. 9, 1994, 94-2 CPD ¶ 231.

[255] *Ogden Logistics Services*, B-257731.2, Dec. 12, 1994, 95-1 CPD ¶ 3.

[256] *J. A. Reyes Assocs., Inc.*, B-230170, June 7, 1988, 88-1 CPD ¶ 536.

[257] *Analex Space Systems, Inc.*, B-259024, Feb. 21, 1995, 95-1 CPD ¶ 106.

[258] *Irwin & Leighton, Inc.*, B-241734, Feb. 25, 1991, 91-1 CPD ¶ 208.

[259] *Systematic Management Services, Inc.*, B-250173, Jan. 14, 1993, 93-1 CPD ¶ 41.

[260] *American Service Technology, Inc.*, B-255075, Feb. 4, 1994, 94-1 CPD ¶ 72.

[261] *Ogden Logistics Services*, B-257731.2, Dec. 12, 1994, 95-1 CPD ¶ 3; *Renow, Inc.*, B-251055, Mar. 5, 1993, 93-1 CPD ¶ 210.

[262] *Aid Maintenance Co.*, B-255552, Mar. 9, 1994, 94-1 CPD ¶ 188. *See also Ogden Government Services*, B-253794.2, Dec. 27, 1993, 93-2 CPD ¶ 339.

[263] *Scheduled Airlines Traffic Offices, Inc.*, B-253856.7, Nov. 23, 1994, 95-1 CPD ¶ 33.

[264] *DRT Assocs., Inc.*, B-237070, Jan. 11, 1990, 90-1 CPD ¶ 47.

[265] *Scientific Management Assocs., Inc.*, B-238913, July 12, 1990, 90-2 CPD ¶ 27.

[266] *Abel Converting, Inc.*, B-224223, Feb. 6, 1987, 87-1 CPD ¶ 130.

[267] *W.M.P. Security Service Co.*, B-256178, May 12, 1994, 94-1 CPD ¶ 303.

[268] *Abt Assocs., Inc.*, B-253220.2, Oct. 6, 1993, 93-2 CPD ¶ 269.
[269] *Maremont Corp.*, B-186276, Aug. 20, 1976, 76-2 CPD ¶ 181.
[270] FAR § 9.104-1.
[271] FAR § 9.103(b).
[272] FAR § 9.103(c).
[273] *Continental Maritime of San Diego, Inc.*, B-249858.2, Feb. 11, 1993, 93-1 CPD ¶ 230.
[274] *Id.* at 7.
[275] *PHE/Maser, Inc.*, B-238367.5, Aug. 28, 1991, 91-2 CPD ¶ 210; *Flight International Group, Inc.*, B-238953.4, Sept. 28, 1990, 90-2 CPD ¶ 257.
[276] *Danville-Findorff, Ltd.*, B-241748, Mar. 1, 1991, 91-1 CPD ¶ 232; *Greyback Concession*, B-239913, Oct. 10, 1990, 90-2 CPD ¶ 278.
[277] *Electrolux SARL*, B-248742, Sept. 21, 1992, 92-2 CPD ¶ 192.
[278] *McLaughlin Research Corp.*, B-247118, May 5, 1992, 92-1 CPD ¶ 422; *Wickman Spacecraft & Propulsion Co.*, B-219675, Dec. 20, 1985, 85-2 CPD ¶ 690.
[279] *FMS Corp.*, B-255191, Feb. 8, 1994, 94-1 CPD ¶ 182.
[280] *Southwest Resource Development*, B-244147, Sept. 26, 1991, 91-2 CPD ¶ 295; *Applied Research Technology*, B-240230, Nov. 2, 1990, 90-2 CPD ¶ 358.
[281] *A & W Maintenance Services, Inc.*, B-255711, Mar. 25, 1994, 94-1 CPD ¶ 214.
[282] *F&H Manufacturing Corp.*, B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520.
[283] *Racal Guardata, Inc.*, B-245139.2, Feb. 7, 1992, 92-1 CPD ¶ 159.
[284] *Suncoast Scientific Inc.*, B-240689, Dec. 10, 1990, 90-2 CPD ¶ 468.
[285] *Central Air Service, Inc.*, B-242283.4, June 26, 1991, 91-2 CPD ¶ 8.
[286] *Duke/Jones Hanford, Inc.*, B-249367.10, July 13, 1993, 93-2 CPD ¶ 26; *Instrument Control Service, Inc.*, B-247286, April 30, 1992, 92-1 CPD ¶ 407.
[287] *Pacific Computer Corp.*, B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292.
[288] *Kunkel-Wiese, Inc.*, B-233133, Jan. 31, 1989, 89-1 CPD ¶ 98.
[289] *Telos Field Engineering*, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240; *NITCO*, B-246185, Feb. 21, 1992, 92-1 CPD ¶ 212.
[290] *Management & Industrial Technologies Assocs.*, B-257656, Oct. 11, 1994, 942 CPD ¶ 134; *Crimson Enterprises, Inc.*, B-243193.4, June 12, 1992, 92-1 CPD ¶ 512.
[291] *Mesa, Inc.*, B-254730, Jan. 10, 1994, 94-1 CPD ¶ 62; *Aumann, Inc.*, B251585.2, May 28, 1993, 93-1 CPD ¶ 423; *Talon Corp.*, B-248086, July 27, 1992, 922 CPD ¶ 55.
[292] *PCL/American Bridge*, B-254511.2, Feb. 24, 1994, 94-1 CPD ¶ 142; *Technology & Management Services, Inc.*, B-240351, Nov. 7, 1990, 90-2 CPD ¶ 375.
[293] *See Pannesma Co.*, B-251688, April 19, 1993, 93-1 CPD ¶ 333.
[294] *Information Spectrum, Inc.*, B-256609.3, Sept. 1, 1994, 94-2 CPD ¶ 251; *Contraves USA, Inc.*, B-241500, Jan. 7, 1991, 91-1 CPD ¶ 17. *See Radiation Systems, Inc.*, B-222585.7, Feb. 6, 1987, 87-1 CPD ¶ 129.
[295] *Communications Int'l Inc.*, B-246076, Feb. 18, 1992, 92-1 CPD ¶ 194.
[296] Mark Martens, *The Best Value of "Risk": How to Account for the Probability of Negative Events*, Contract Management 47 (Mar. 1995).
[297] *Delta Computec, Inc.*, B-225442, Feb. 9, 1987, 87-1 CPD ¶ 139.
[298] *CACI, Inc.*, B-225444, Jan. 13, 1987, 87-1 CPD ¶ 53.
[299] *John Brown U.S. Services, Inc.*, B-258158, Dec. 21, 1994, 95-1 CPD ¶ 35 at 10.
[300] *Premier Vending*, B-256437, June 23, 1994, 94-1 CPD ¶ 380; *Advanced Resources Int'l, Inc.—Recon.*, B-249679.2, April 29, 1993, 93-1 CPD ¶ 348.
[301] *Individual Development Assocs., Inc.*, B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290.
[302] *Litton Systems, Inc.*, B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114 at 7-8.
[303] *PCB Piezotronics, Inc.*, B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286; *Triton Marine Construction Corp.*, B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171.
[304] *RAI, Inc.*, B-250663, Feb. 16, 1993, 93-1 CPD ¶ 140; *Earth Resources Corp.*, B-248662.2, Nov. 5, 1992, 92-2 CPD ¶ 323.
[305] *Nicolet Instrument Corp.*, B-258569, Feb. 3, 1995, 95-1 CPD ¶ 48.
[306] *SeaSpace*, B-241564, Feb. 15, 1991, 91-1 CPD ¶ 179.
[307] *DUAL, Inc.*, B-252593.3, Aug. 31, 1993, 93-2 CPD ¶ 190.
[308] *Michael C. Avino, Inc.*, B-250689, Feb. 17, 1993, 93-1 CPD ¶ 148.
[309] *John Brown E & C*, B-243247, July 5, 1991, 91-2 CPD ¶ 27.
[310] *Cherry Hill Travel Agency, Inc.*, B-240386, Nov. 19, 1990, 90-2 CPD ¶ 403.
[311] *Picker Int'l, Inc.*, B-249699.3, Mar. 30, 1993, 93-1 CPD ¶ 275.
[312] *See ALM, Inc.*, B-225589, May 7, 1987, 87-1 CPD ¶ 486.
[313] *Northwest EnviroService, Inc.*, B-247380.2, July 22, 1992, 92-2 CPD ¶ 38. *See Sperry Corp.*, B-225492, Mar. 25, 1987, 87-1 CPD ¶ 341.
[314] *See* Robert J. Kenney, Jr. & Daniel C. Sweeney, *Best Value Procurement*, Briefing Paper 93-4, Federal Publications Inc. (Mar. 1993).
[315] *Southern Commercial Industries, Inc.*, B-229969, April 25, 1988, 88-1 CPD ¶ 397.
[316] *See Corbetta Construction Co.*, B-182979, Sept. 12, 1975, 75-2 CPD ¶ 144.
[317] *See* Pushkar, Lent, & Hopkins, *Past Performance Evaluations*, Briefing Paper No. 94-6, Federal Publications Inc. (May 1994).
[318] 15 U.S.C. § 637(b)(7)(A).
[319] *RMS Industries*, B-247229, May 19, 1992, 92-1 CPD ¶ 451.

[320] *A & W Maintenance Services, Inc.*, B-258293, Jan. 6, 1995, 95-1 CPD ¶ 8; *VR Environmental Services*, B-246917, April 15, 1992, 92-1 CPD ¶ 370; *Pais Janitorial Service & Supplies, Inc.*, B-244157, June 18, 1991, 91-1 CPD ¶ 581.

[321] *INTERLOG*, B-249613, Oct. 26, 1992, 92-2 CPD ¶ 282.

[322] *D. M. Potts Corp.*, B-247403.2, Aug. 3, 1992, 92-2 CPD ¶ 65.

[323] *IBIS Corp.*, B-224542, Feb. 9, 1987, 87-1 CPD ¶ 136.

[324] *F & H Manufacturing Corp.*, B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520.

[325] *Data Systems Analysts, Inc.*, B-255684, Mar. 22, 1994, 94-1 CPD ¶ 209.

[326] *Docusort, Inc.*, B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38; *Advanced Resources Int'l, Inc.*, B-249679, Nov. 18, 1992, 92-2 CPD ¶ 357.

[327] *Califone Int'l, Inc.*, B-246233, Feb. 25, 1992, 92-1 CPD ¶ 226; *Arrowsmith Industries, Inc.*, B-233212, Feb. 8, 1989, 89-1 CPD ¶ 129.

[328] *Renic Corp.*, B-248100, July 29, 1992, 92-2 CPD ¶ 60.

[329] *Clegg Industries, Inc.*, B-242204.3, Aug. 14, 1991, 91-2 CPD ¶ 145.

[330] *See* FAR § 9.104-1.

[331] *Quoted in* Thirteenth Annual Report of the Select Committee on Small Business of the United States Senate, S. Rep. No. 104, 88th Cong., 1st Sess. at 31 (April 2, 1963).

[332] 3 Comp. Dec. 437, 438 (1897).

[333] 7 Comp. Dec. 712, 714 (1901).

[334] 25 Comp. Dec. 398, 404 (1918).

[335] 32 Comp. Gen. 384, 387 (1953).

[336] 10 Comp. Gen. 294, 300 (1931).

[337] 20 Comp. Gen. 18, 21 (1940). Contract provisions are unauthorized unless reasonably requisite to the accomplishment of the legislative purposes of the contract appropriation. 18 Comp. Gen. 285, 295 (1938).

[338] 20 Comp. Gen. 18, 21 (1940).

[339] Unpub. Comp. Gen., A-33338 (Oct. 3, 1930).

[340] Unpub. Comp. Gen., A-26439 (April 12, 1929).

[341] 31 U.S.C. § 1341.

[342] FAR § 10.002(a)(4). *See Project Software & Development, Inc.*, GSBCA No. 8471-P, 86-3 BCA ¶ 19,082 at 96,403 (if expressions of actual requirements overstate an agency's needs, those expressions are improper).

[343] *Greenborne & O'Mara—Recon.*, B-247116.3, Oct. 7, 1992, 92-2 CPD ¶ 229 at 2-3.

[344] *East West Research, Inc.*, B-239516, Aug. 29, 1990, 90-2 CPD ¶ 178; *Consolidated Maintenance Co.*, B-220174, Nov. 12, 1985, 85-2 CPD ¶ 539.

[345] *Digital Equipment Corp.*, B-183614, Jan. 14, 1976, 76-1 CPD ¶ 21.

[346] *Jones Refrigeration Service*, B-221661.2, May 5, 1986, 86-1 CPD ¶ 431.

[347] *W.M.P. Security Service Co.*, B-256178, May 12, 1994, 94-1 CPD ¶ 303.

[348] *National Steel & Shipbuilding Co.*, B-250305.2, Mar. 23, 1993, 93-1 CPD ¶ 260; *Trident Systems Inc.*, B-243101, June 25, 1991, 91-1 CPD ¶ 604.

[349] *Mandex, Inc.*, B-241759, Mar. 5, 1991, 91-1 CPD ¶ 244.

[350] *Astro Pak Corp.*, B-256345, June 6, 1994, 94-1 CPD ¶ 352; *Marine Instrument Co.*, B-241292.3, Mar. 22, 1991, 91-1 CPD ¶ 317.

[351] *Computervision Corp.*, GSBCA No. 8601-P, 86-3 BCA ¶ 19,266 at 97,409.

[352] *Sierra Technology & Resources, Inc.*, B-243777.3, May 19, 1992, 92-1 CPD ¶ 450; *Microeconomic Applications, Inc.*, B-224560, Feb. 9, 1987, 87-1 CPD ¶ 137.

[353] *Paul G. Koukoulas*, B-229650, Mar. 16, 1988, 88-1 CPD ¶ 278.

[354] *American Contract Services, Inc.*, B-256196.2, June 2, 1994, 94-1 CPD ¶ 342; *SeaSpace Corp.*, B-252476.2, June 14, 1993, 93-1 CPD ¶ 462.

[355] *Arthur Anderson & Co.*, B-245903, Feb. 10, 1992, 92-1 CPD ¶ 168 at 4.

[356] *Id.*; *Cadmus Group, Inc.*, B-241372.3, Sept. 25, 1991, 91-2 CPD ¶ 271.

[357] *Midwest Research Institute*, B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364; *Sparta, Inc.*, B-228216, Jan. 15, 1988, 88-1 CPD ¶ 37.

[358] *SEC, Inc.*, B-226978, July 13, 1987, 87-2 CPD ¶ 38.

[359] *Calspan Corp.*, B-258441, Jan. 19, 1995, 95-1 CPD ¶ 28.

[360] *Barron Builders & Management Co.*, B-225803, June 30, 1987, 87-1 CPD ¶ 645 at 4-5.

[361] *Ogden Plant Maintenance Co.*, B-255156.2, April 7, 1994, 94-1 CPD ¶ 275 at 5.

[362] *Benchmark Security, Inc.*, B-247655.2, Feb. 4, 1993, 93-1 CPD ¶ 133; *Wyle Laboratories, Inc.*, B-239113, Aug. 6, 1990, 90-2 CPD ¶ 107.

[363] *See* Paul Shnitzer & Thomas P. Humphrey, *The Scope of the Source Selection Official's Discretion*, Briefing Paper 94-5, Federal Publications Inc. (April 1994).

[364] *Contel Federal Systems, Inc.*, GSBCA No. 9743-P, 89-1 BCA ¶ 21,458 at 108,124.

[365] 19 F.3d 1342 (11th Cir. 1994).

[366] *East West Research, Inc.*, B-238633, June 13, 1990, 90-1 CPD ¶ 555.

[367] *Mart Corp.*, B-254967.3, Mar. 28, 1994, 94-1 CPD ¶ 215. In *Corbin Superior Composites, Inc.*, B-242394, April 19, 1991, 91-1 CPD ¶ 389 at 5, the Comptroller General said it would question the agency's determination of minimum needs only if it had "no reasonable basis."

[368] *JSA Healthcare Corp.*, B-252724, July 26, 1993, 93-2 CPD ¶ 54; *Federal Environmental Services, Inc.*, B-250135.4, May 24, 1993, 93-1 CPD ¶ 398.

[369] *General Crane & Hoist, Inc.*, B-258819, Feb. 21, 1995, 95-1 CPD ¶ 99; *Family Realty*, B-247772, July 6, 1992, 92-2 CPD ¶ 6.
[370] *Brunswick Defense*, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225; *COMSAT Int'l Communications, Inc.*, B-223953, Nov. 7, 1986, 86-2 CPD ¶ 532 ("We will question contracting officials' determinations only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations.")
[371] *KPMG Peat Marwick*, B-255224, Feb. 15, 1994, 94-1 CPD ¶ 111.
[372] *Johns Hopkins Univ.*, B-233384, Mar. 6, 1989, 89-1 CPD ¶ 240.
[373] *D. M. Potts Corp.*, B-247403.2, Aug. 3, 1992, 92-2 CPD ¶ 65.
[374] *Pratt & Lambert, Inc.*, B-245537, Jan. 9, 1992, 92-1 CPD ¶ 48.
[375] *Aspect Telecommunications*, GSBCA No. 11250-P, 91-3 BCA ¶ 24,199.
[376] *Computer Lines*, GSBCA No. 8206-P, 86-1 BCA ¶ 18,653.
[377] *Materials, Communication & Computers, Inc. v. Defense Logistics Agency*, GSBCA No. 12930-P, 95-1 BCA ¶ 27,312.
[378] *TRW Inc.*, GSBCA No. 11309-P, 92-1 BCA ¶ 24,389.
[379] *Latecoere International, Inc. v. United States*, note 365, *supra*, and cases cited at 1356.
[380] Acquisition Reform, 60 Fed. Cont. Rep. 235 (Sept. 13, 1993).
[381] Steven Kelman, *Procurement and Public Management I* (American Enterprise Institute Press 1990).
[382] Pub. L. No. 103-355 (Oct. 13, 1994), 108 Stat. 3243.
[383] *A Guide to Best Practices for Past Performance*, Office of Federal Procurement Policy (Interim ed. May 1995).
[384] *Id.* at 13.
[385] *Laidlaw Environmental Services, Inc.*, B-256346, June 14, 1994, 94-1 CPD ¶ 365 at 6-7.
[386] *SDA Inc.*, B-256075, May 2, 1994, 94-2 CPD ¶ 71 at 6-7.
[387] *Young Enterprises, Inc.*, B-256851.2, Aug. 11, 1994, 94-2 CPD ¶ 159 at 4-5.
[388] Federal Acquisition Reform Act of 1995, Special Supplement, 63 Fed. Cont. Rep. No. 20 (May 22, 1995).
[389] *Id.* at S-7.
[390] Acquisition Reform, 63 Fed. Cont. Rep. 641, 643 (May 22, 1995).
[391] 141 *Cong. Rec.* H5912 (daily ed. June 14, 1994).
[392] *Id.* at H5926.
[393] *Id.* at H5936; 63 Fed. Cont. Rep. 743 (June 19, 1995).
[394] 141 *Cong. Rec.* H5924, H5926 (daily ed. June 14, 1995).
[395] *Id.* at H5930, 5931.
[396] *Id.* at H5932.
[397] FAR § 15.609(a).
[398] *See* Special Supplement, 63 Fed. Cont. Rep. No. 12 (Mar. 27, 1995).
[399] *Id.* at S-77.
[400] FAR § 15.609(a); *Reliable System Services Corp.*, B-248126, July 28, 1992, 92-2 CPD ¶ 57.
[401] *PeopleWorks, Inc.*, B-257296, Sept. 2, 1994, 94-2 CPD ¶ 89; *Aid Maintenance Co.*, B-255552, Mar. 9, 1994, 94-1 CPD ¶ 188.
[402] *ARC Professional Services Group, Inc. v. General Services Administration*, GSBCA No. 12699-P, 94-2 BCA ¶ 26,845 at 133,573; *Integrated Systems Group, Inc.*, GSBCA No. 11156-P, 91-2 BCA ¶ 23,961 at 119,956.
[403] *EER Systems Corp.*, B-256383, June 7, 1994, 94-1 CPD ¶ 354; *Information Systems & Networks Corp.*, B-220661, Jan. 13, 1986, 86-1 CPD ¶ 30.
[404] *Telcom Systems Services, Inc. v. Department of the Interior*, GSBCA No. 12993-P, 95-1 BCA ¶ 27,346; *Information Ventures, Inc.*, B-243929, Sept. 9, 1991, 91-2 CPD ¶ 227.
[405] *National Systems Management Corp.*, B-242440, April 25, 1991, 91-1 CPD ¶ 408; *StaffAll*, B-233205, Feb. 23, 1989, 89-1 CPD ¶ 195.
[406] 141 *Cong. Rec.* H5930-31 (daily ed. June 14, 1995).
[407] *Pendus Building Services, Inc.*, B-25721.3, Mar. 8, 1995, 95-1 CPD ¶ 135 (even acceptable proposals with no reasonable chance of award can be excluded); *Better Service*, B-256498.2 Jan. 9, 1995, 95-1 CPD ¶ 11 (proposal lacking sufficient information to determine compliance can be excluded without discussions).
[408] *See* notes 10, 11, and 12, *supra*.
[409] Edward Felsenthal, *Weekend Warriors Find a New Arena: Court*, Wall St. J., June 23, 1995, at B1.
[410] Robert Bolt, *A Man For All Seasons* 66 (Vintage International 1990).